86-960

Supreme Court, U.S.
FILED
DEC 10 1986
JOSEPH F. SPANIOL, JR.
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No. .....

In The
Supreme Court of the United States
October Term, 1986

HIGH TIDE SEAFOODS, *et al.*,
Appellants,

v.

STATE OF WASHINGTON, *et al.*,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

Pursuant to Wash. Rev. Code § 82.27.020(1) (1981), the State of Washington imposes an excise tax upon parties who purchase certain food fish for commercial purposes. Purchasers are authorized to deduct one-half of the tax from the price they pay to the fishermen. Wash. Rev. Code § 82.27.020(2) (1981). However, the tax can not be deducted from the price paid to Indian fishermen owing to the tax immunity conferred by federal treaties. Thus, the taxing scheme either increases the cost of transactions with treaty Indian fishermen or requires treaty Indian fishermen to bear the economic burden of the tax in order to remove the competitive disadvantage created by the taxing scheme.

1. Is the State of Washington's fish excise tax repugnant to the Constitution, laws and treaties of the United States as applied to purchases of fish from treaty Indian fishermen?

2. Does the State of Washington's fish tax violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution by increasing the cost of fish purchased from treaty Indian fishermen as compared to the cost of fish purchased from non-treaty fishermen?

LIST OF PARTIES

The appellants are High Tide Seafoods, a partnership, and its two owners, James L. Shefler, as his separate estate; and Ernest J. Vail, a single person.

The appellees are the State of Washington; the State of Washington Department of Revenue; and the Director of Revenue of the State of Washington.

These parties are identical to the parties in the case below.

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CONSTITUTIONAL PROVISIONS INVOLVED

1. Article I, Section 8, Clause 3 of the United States Constitution provides:

> The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

2. Amendment Fourteen, Section 1 of the United States Constitution provides in pertinent part:

> Nor shall any State . . . deny to any person within its jurisdiction the equal protection of the laws.

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TREATIES INVOLVED

The following provision from Article 3 of the Treaty of Medicine Creek, 10 Stat. 1132 (1855), is typical of the treaty provisions securing off-reservation fishing rights to the Indian tribes in western Washington.

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory.

Other treaties containing substantially identical provisions, and the signatory tribes to each of these treaties, are listed in *United States v. Washington,* 384 F. Supp. 312, 349 (W.D. Wash. 1974).

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STATUTES INVOLVED

1. Wash. Rev. Code § 82.27.020 (1981) provides:

> (1) In addition to all other taxes, licenses, or fees provided by law there is established an excise tax

on the possession of food fish and shellfish for commercial purposes as provided in this chapter. The tax is levied upon and shall be collected from the owner of the food fish or shellfish whose possession constitutes the taxable event. The taxable event is the first possession by an owner after the food fish or shellfish have been landed. Processing and handling of food fish and shellfish by a person who is not the owner is not a taxable event to the processor or handler.

(2) A person in possession of food fish and shellfish and liable to this tax may deduct from the price paid to the person from which such food fish or shellfish (except oysters) are purchased an amount equal to a tax at one-half the rate levied in this section upon these products.

(3) The measure of the tax is the price paid by the first person in possession of the food fish or shellfish. If the food fish or shellfish are acquired other than by purchase or are purchased under conditions where the purchase price does not represent the value of the food fish or shellfish or these products are transferred outside the state without sale, the measure of the tax shall be determined as nearly as possible according to the selling price of similar products of like quality and character under rules adopted by the department of revenue.

(4) The tax shall be equal to the measure of the tax multiplied by the rates for food fish and shellfish as follows:

(a) Chinook, coho, and chum salmon: five percent.

(b) Pink and sockeye salmon: three percent.

(c) Other food fish and shellfish, except oysters: two percent.

(d) Oysters: seven one-hundredths of one percent.

2. Wash. Rev. Code § 82.27.040 (1981) provides:

> A credit shall be allowed against the tax imposed by RCW 82.27.020 upon food fish or shellfish with respect to any tax legally imposed and paid to another state by the taxpayer upon the same food fish or shellfish purchased in the other state.

OPINIONS BELOW

The opinion of the Supreme Court of the State of Washington is reported at 106 Wash. 2d 695, 725 P.2d 411 (Sept. 11, 1986), and is reproduced as Appendix A. The order of the Thurston County Superior Court granting summary judgment to the State of Washington is unreported and is unrecorded. The determinations of the Washington Department of Revenue denying appellant's petition for a refund are unreported. Final Determination No. 82-128A, issued by the Interpretation and Appeals Division, is reproduced as Appendix B. Final Determination No. 82-128, issued by the Chief Hearings Examiner, is reproduced as Appendix C.

JURISDICTION

This is a civil action for a refund of the Washington fish excise tax imposed pursuant to Wash. Rev. Code § 82.27.020 (1981) (hereafter RCW).

The decision of the Supreme Court of the State of Washington was entered on September 11, 1986. No mo-

tion for rehearing was filed. Pursuant to Washington Rules of Appellate Procedure 12.5(c) and 12.7(b), the decision of the Supreme Court of the State of Washington became final on October 1, 1986. Appellant's notice of appeal to this Court was filed with the Washington Supreme Court on December 4, 1986.

The appellate jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(2). *See, e.g., Ramah Navajo School Board, Inc. v. Bureau of Revenue,* 458 U.S. 832 (1982); *Central Machinery Co. v. Arizona State Tax Comm'n.,* 448 U.S. 160 (1980); *McClanahan v. Arizona State Tax Comm'n.,* 411 U.S. 164 (1973).[1]

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STATEMENT OF THE CASE

A. Introduction

Appellant High Tide Seafoods (High Tide) is a partnership that purchases fresh salmon from fishermen, processes the fish, and then sells them to third party wholesalers. High Tide buys salmon from both treaty Indian and non-treaty fishermen.

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[1] In the event the Court determines it does not have appellate jurisdiction, appellant requests that the Court treat this Jurisdictional Statement as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1257(3) and 28 U.S.C. § 2103. The importance of the issues presented in this case concerning the extent to which a State may burden Indian commerce are sufficiently compelling to justify the exercise of this Court's discretionary jurisdiction. In addition, as discussed *infra* at 12-17, the decision below conflicts with controlling decisions of this Court and with a decision of the United States Court of Appeals for the Ninth Circuit.

The activities of High Tide are taxable under RCW 82.27 (1981), quoted *supra* at 2, an excise tax on enhanced food fish. Under the statute, the taxable event is the first possession by an owner for commercial purposes after the fish have been landed. Salmon are taxed at the rates of three or five percent of the purchase price depending on the species.

For purposes of this case, the most significant aspect of the tax is that the parties liable for the tax, fish purchasers, are allowed to deduct one-half of the tax from the price paid to the fishermen. RCW 82.27.020(2) quoted *supra* at 2; App. 3. Credits were allowed on taxes paid to other states, Former RCW 82.27.040 (1981), quoted *supra* at 3, but there was no comparable credit for tribal taxes at the time the taxes here at issue were paid and refunds were sought. *See infra* at 22 n.14.

Treaty Indian fishermen participate in the salmon harvest pursuant to their fishing rights secured by treaties. They are entitled to fifty percent of the harvestable fish. *Washington v. Fishing Vessel Ass'n.*, 443 U.S. 658 (1979). Federal law precludes any taxes from being imposed on, or passed on to, treaty Indian fishermen. *Tulee v. Washington*, 315 U.S. 681 (1942); App. 2.

Indian tribes also impose fish taxes on both treaty Indian fishermen and fish purchasers. Examples of such tribal taxes are reproduced in Appendices D and E. The overlapping impact of Washington's fish excise tax and tribal taxes, combined with the absence of any State credit for tribal taxes, subjects High Tide and other purchasers of fish from treaty Indian fishermen to double taxes and

thereby places treaty Indian fishermen at a competitive disadvantage.

B. History of Washington's Fish Excise Taxes.

RCW 82.27 became effective on July 1, 1980. This statute was preceded by other forms of taxes on both commercial purchasers of food fish and commercial fishermen. To fully appreciate the effects of the current taxing scheme, an understanding of the predecessors to RCW 82.27 is necessary.

Prior to 1978, Washington levied a two percent "privilege fee" on purchasers of salmon and a two percent "catch fee" on commercial fishermen. Former RCW 75.32 (1962). Neither purchasers nor fishermen were given credits for taxes collected from the other, nor was either authorized to pass along all or any part of the tax. The tax on fishermen could not be applied to Indians exercising their reserved treaty right to fish outside the reservation by virtue of this Court's decision in *Tulee v. Washington,* 315 U.S. 681 (1942), holding that Indians could not be charged a fee for exercising their off-reservation treaty fishing rights. The pre-1978 law therefore had the effect of enabling Washington to collect a four percent tax on non-treaty commercial fish and a two percent tax on treaty Indian commercial fish.

Prior to the mid-1970s, the reduced revenues on Indian treaty commercial fish did not present a substantial problem to the State because the Indians were taking only two percent of the total harvestable salmon. *See Washington v. Fishing Vessel Ass'n, supra,* 443 U.S. at 676 n.22. In the mid-1970's, however, the federal courts held that the

Indian tribes are entitled to fifty percent of the harvestable fish. *United States v. Washington,* 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd,* 520 F.2d 676 (9th Cir. 1975), *cert. denied,* 423 U.S. 1086 (1976). The District Court's allocation eventually was approved by this Court in *Washington v. Fishing Vessel Association, supra.*

At the height of the conflict over treaty fishing rights, when the State was engaged in "extraordinary machinations" to frustrate the federal court's decree upholding the tribes' right to fifty percent of the harvestable fish, *see Washington v. Fishing Vessel Ass'n, supra,* 443 U.S. at 696 n.36, the Washington State Legislature changed the fish tax. Effective January 1, 1978, the "privilege fee" levied against fish purchasers was doubled. The "catch fee" levied against fishermen was set at a rate equal to one-half of the "privilege fee" and was denominated a "sales tax." Fish purchasers received a credit against their "privilege fee" for "sales taxes" collected from fishermen. Former RCW 75.32 (1978).

Under this 1978 law, Washington collected a four percent tax on all commercial fish. On purchases from non-treaty fishermen, the economic burden of the tax was shared equally by the purchaser and the fisherman by virtue of the credit provision. *See* former RCW 75.32.033 (1978). On purchases from Indian treaty fishermen, the purchaser paid the full amount of the tax since the "sales tax" was inapplicable to, and could not be collected from, treaty Indian fishermen. The 1978 amendment had the effect of doubling revenues to the State from sales of fish caught by treaty Indian fishermen.

The taxing scheme was changed again effective July 1, 1980. The "sales tax" imposed on fishermen was elim-

inated. On its face, the statute placed the entire legal incidence of the tax on purchasers. *See* RCW 82.27.020(1) (1981) quoted *supra* at 2. But the credit provision was amended to provide that the purchaser "may deduct from the price paid to the [fisherman] an amount equal to a tax at one-half the rate [imposed against the purchaser]." RCW 82.27.020(2) (1981), quoted *supra* at 2.

The practical, economic effect of the 1980 fish tax was identical to that of the fish tax enacted in 1978. Because Indian treaty fishermen cannot be taxed by the State, the credit or pass-through provisions of both the 1978 and 1980 tax schemes operate in a manner that either imposes the economic burden of half the tax on treaty Indian fishermen or makes it more expensive for fish purchasers to buy fish from treaty Indian fishermen than from their non-Indian counterparts. *See,* App. 11-13. *See also, Department of Fisheries v. DeWatto Fish Co.,* 34 Wash. App. 135, 149-150, 600 P.2d 296, 306 *rev'd,* 100 Wash. 2d 568, 674 P.2d 659 (1983).

C. Administrative Proceedings Below.

From July 1, 1980, through March 31, 1983, High Tide paid $153,041.13 in taxes to the State of Washington pursuant to the fish tax imposed by RCW 82.27. Of that amount $97,852.79 was attributable to taxes on High Tide's transactions with treaty Indian fishermen. App. 1-2.

In January 1981, after paying the fish excise tax under protest, High Tide filed a Petition for Refund with the Washington Department of Revenue. In its Petition and throughout the State administrative and judicial proceedings, High Tide challenged the tax as being repugnant to, *inter alia,* the laws and treaties of the United States and

the Equal Protection and Indian Commerce Clauses of the United States Constitution. In May 1982, the Chief Hearings Examiner issued Final Determination No. 82-182 denying High Tide's Petition. App. 22.

High Tide then sought an administrative appeal of Final Determination No. 82-128 pursuant to the procedures of the Washington Department of Revenue. Final Determination No. 82-128A, issued in November 1982 by the Appeals Division again denied High Tide's Petition. App. 18.

D. State Judicial Proceedings Below.

In December 1982, High Tide filed a Notice of Appeal from Department of Revenue Final Determination No. 82-182A and a Complaint for Refund of Taxes Paid, With Interest, and Declaratory and Injunctive Relief. The case was continued pending a final decision by the Washington Supreme Court in the then pending case of *Department of Fisheries v. DeWatto Fish Co.,* 100 Wash. 2d 568, 674 P.2d 659 (1983).

DeWatto was decided in December 1983. A year later, High Tide's Motion for Summary Judgment and that of the Department of Revenue were brought before the Washington Superior Court in Thurston County. In December 1984, that court ruled in favor of the Washinton Department of Revenue, holding that RCW 82.27 does not violate any of the provisions of the United States or the Washington State Constitutions. High Tide then filed a Notice of Appeal to the Washington Court of Appeals. Pursuant to Washington Rule of Appellate Procedure 4.3, the appeal was transferred to the Washington Supreme Court.

On September 11, 1986, the Washington Supreme Court upheld the constitutionality of RCW 82.27 as applied to High Tide. App. A. The court first ruled that High Tide has standing to challenge the fish excise tax on the grounds that it violates the Indian Commerce and Equal Protection Clauses of the Constitution, citing *Craig v. Boren,* 429 U.S. 190 (1976); App. 8. On the merits, the Court acknowledged that half of the economic burden of the challenged tax scheme would fall on treaty Indian fishermen. Its opinion includes the following illustration. App. 12-13.

If a fish purchaser has the opportunity to buy a chinook salmon from a non-treaty fisherman for $10, the total tax would be $0.50, of which $0.25 would be deducted from the price paid to the fishermen. The total cost of the salmon to the fish purchaser therefore would be $10.25, out of which the non-treaty fishermen would receive $9.75.

If the same fish purchaser has the opportunity to buy an identical chinook salmon from a treaty Indian fisherman, the purchaser would have to pay the full excise tax of $0.50. No portion of the tax could be passed on directly to the treaty fisherman. Thus, the total cost to the fish purchaser would be $10.50.

The Washington Supreme Court acknowledged that, in these circumstances, the fish purchaser obviously would buy the fish from the non-treaty fisherman because it would cost $0.25 less than an identical fish bought from a treaty Indian fisherman. Nevertheless, the court concluded that the tax did not violate the Indian Commerce Clause of the United States Constitution because "the

parties have an opportunity to allocate the burden among themselves" by the treaty Indian fisherman agreeing to accept $9.75 instead of $10.00 for his fish. App. 11-12.[2] In support of its holding, the court relied on this Court's decisions in non-Indian cases upholding the validity of state taxes which shift the legal incidence from the United States to taxable parties, such as federal contractors, employees and lessees, even if the economic burden eventually fell on the United States. App. 11. *See also, Department of Fisheries v. DeWatto Fish Co., supra,* 100 Wash. 2d at 573-577, 674 P.2d at 662-664. The Court recognized, however, that "no clear and concise modern test for the validity of taxes affecting Indian commerce has been articulated by the United States Supreme Court." App. 10. The court did not address any of the issues or complexities raised by the existence of either tribal taxes on commercial fish sales or the credit provided under the Washington statute for taxes paid to other States but not to Indian tribes.

The Washington Supreme Court also held that the challenged tax scheme does not violate High Tide's right to equal protection of the laws. This ruling was based on the "equal economic burden [placed] on all fish sales regardless of when or from whom the fish was purchased." App. 10.

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[2] For purposes of this case, it does not matter whether the two and a half percent economic burden borne by treaty Indian fishermen is characterized as an indirect tax or as the diminished market value of their fish.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

A. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT.

In *Tulee v. Washington*, 315 U.S. 681 (1942), this Court reversed the state conviction of an Indian for fishing without a state fishing license, holding that the treaty right to fish outside a reservation "forecloses the state from charging the Indians a fee." 315 U.S. at 684-685. The *Tulee* decision precludes States from imposing any charges on the exercise of treaty reserved rights. *Cohen's Handbook of Federal Indian Law* 431 (1982 ed.).

The Washington Supreme Court did not directly address the issue posed by *Tulee*.[3] Instead, it held that the challenged fish excise tax is constitutional precisely because fish purchasers have the opportunity to pass the economic burden of the tax on to Indian treaty fishermen. App. 12-13. In so holding, the Washington Supreme Court approved of private fish purchasers doing precisely what

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[3] The Washington Supreme Court's avoidance of *Tulee* may be explained by its statement that High Tide does not have standing to challenge RCW 82.27 by asserting treaty rights of Indians. App. 8. But it is impossible to reconcile that aspect of its decision with its subsequent analysis of the Indian Commerce Clause issue and its holding on the merits that the economic burden of Washington's fish excise tax on Indian treaty fishermen is permissible. App. 11-13.

In any event, High Tide clearly has jus tertii standing to assert the concommitant rights of third parties for the same reasons that this Court upheld the jus tertii standing of licensed beer vendors to rely on the objections of 18-20 year old males to the constitutionality of a state statute in Craig v. Boren, 429 U.S. 190, 192-197 (1976). The Washington Supreme Court relied on Craig v. Boren in upholding High Tide's standing under the Indian Commerce Clause. App. 8. Its refusal to apply the same logic to the assertion of Indian treaty rights is inexplicable.

Tulee prohibits the States from doing, i.e., charging the Indians a fee for exercising their treaty-reserved right to fish. The result reached by the Washington Supreme Court obviously and directly conflicts with *Tulee*.

This Court recently had occasion to address an analogous effort by a State to force Indians to relinquish their special rights, privileges and immunities. In *Three Affiliated Tribes v. Wold Engineering*, 106 S.Ct. 2305 (1986), a North Dakota statute conditioned access by Indians and Indian tribes to state courts upon the tribes' acceptance of state court jurisdiction. This Court recognized the "weighty" interest in ensuring that all citizens have access to the courts and that this interest was served by the statute. 106 S.Ct. at 2312. But it held that the price exacted by the North Dakota statute, waiver of the unique sovereign rights and jurisdictional status enjoyed by Indian tribes under federal law, was too great. "Simply put, the state interest, as presently implemented, is unduly burdensome on the federal and tribal interests." 106 S.Ct. at 2312.

Washington's fish excise tax operates in a similar fashion. As acknowledged by the Washington Supreme Court, the effect of the pass-through provision is to compel treaty Indian fishermen to relinquish their treaty conferred tax immunity in order to remain competitive. App. 12. *Three Affiliated Tribes* holds that States cannot achieve their otherwise permissible objectives in that way. Indeed, Washington's statute is much more burdensome and intrusive than North Dakota's. The Washington statute does not offer any offsetting benefits. Nor does it provide the Indians with a real choice; if they do not lower their price and indirectly pay the tax, they will not be able to sell their fish.

In its opinion below and in the related case of *Department of Fisheries v. DeWatto Fish Co., supra,* 100 Wash. 2d at 573-577, 674 P.2d at 662-664, the Washington Supreme Court relied on a series of this Court's decisions in non-Indian cases upholding state taxes in which the legal incidence of the tax was shifted from the United States to taxable parties such as federal licensees, lessees and contractors. App. 11.[4] While this Court has applied the "legal incidence" criterion to state taxes affecting the federal government, it has expressly declined to apply a test "under which the legal incidence and not the actual burden of the tax" controls the inquiry as to whether state taxes affecting Indian commerce are permissible. *Ramah Navajo School Board, Inc. v. Bureau of Revenue,* 458 U.S. 832, 844 n.8 (1982). In *White Mountain Apache Tribe v. Bracker,* 448 U.S. 136 (1980), this Court summarily rejected the States' position that they are free to tax transactions with Indians as long as the legal incidence of the tax falls on non-Indians, stating: "That is simply not the law." 448 U.S. at 150-151.

This Court has repeatedly emphasized that the validity of state taxation of Indian commerce "is not controlled by standards of preemption developed in other areas." *Ramah Navajo, supra,* 458 U.S. at 838. *See also, New Mexico v. Mescalero Apache Tribe,* 462 U.S. 324, 333-334 (1983); *White Mountain Apache Tribe v. Bracker, supra,* 448 U.S. at 143-144 (1980). Indeed, this Court struck down a state tax as applied to non-Indian contractors with an Indian school board after the very same tax had been up-

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[4] The Washington Supreme Court cited Washington v. United States, 460 U.S. 536, 541-542 n.4 (1983); United States v. County of Fresno, 429 U.S. 452 (1977); and United States v. Detroit, 355 U.S. 466 (1958).

held as applied to federal contractors. *See Ramah Navajo, supra,* and 458 U.S. at 855-857 (Rehnquist, J., dissenting). *Compare also, McClanahan v. Arizona State Tax Comm'n,* 411 U.S. 164 (1973) (reservation Indian not subject to state personal income tax) *with United States v. County of Fresno,* 429 U.S. 452 (1977) (employee of United States Forest Service subject to county prossessory interest tax on federal housing located in National Forest).

By relying on decisions arising in other contexts and ignoring the different standards applicable to Indian commerce as well as the bearing of *Tulee v. Washington, supra,* the Washington Supreme Court reached a result that conflicts with the decisions of this Court.

B. THE DECISION BELOW CONFLICTS WITH THE HOLDING OF THE NINTH CIRCUIT ON A SIMILAR ISSUE.

In concluding that a Washington State regulatory program impermissibly burdened the exercise of Indian treaty fishing rights, the United States Court of Appeals for the Ninth Circuit looked beyond the facial neutrality of the regulatory program, carefully analyzed its actual effect on Indian treaty fishermen, and determined that it affirmatively hindered and discriminated against the exercise of rights secured by treaty. *United States v. Washington,* 645 F.2d 749 (9th Cir. 1981), *aff'g,* 459 F. Supp. 1020, 1089-1093 (W.D. Wash. 1976). The legal underpinning of the Ninth Circuit's decision was its holding that "the supremacy clause requires, at a minimum, that the State choose the less adverse of two alternative regulatory measures if the regulation is to be applied to Treaty fishing." *United*

States v. Washington, supra, 645 F.2d at 756 n.15. *See also* 645 F.2d at 754.[5]

The decision below directly conflicts with the Ninth Circuit Court of Appeals' decision in *United States v. Washington, supra.* Washington's challenged taxing scheme admittedly operates in practice to the detriment of treaty Indian fishing. As the State's intermediate court of appeals noted in holding Washington's previous and similar taxing scheme invalid under the Indian Commerce Clause, the effect of Washington's fish tax is to discourage fish purchasers from buying from treaty Indians "because to do so would be to lose the economic advantage of having [the purchasers'] tax burden reduced by half." *Department of Fisheries v. DeWatto Fich Co.,* 34 Wash. App. 135, 150-152, 660 P.2d 298, 306, *rev'd,* 100 Wash. 2d 568, 674 P.2d 659 (1983).

The Washington Supreme Court did not disagree with that analysis. Rather, its rejection of High Tide's challenge was predicated solely on the assumed ability of treaty Indian fishermen to accept a reduced price for their fish and thereby offset the economic advantage Washington's tax confers on purchases of fish from non-treaty fishermen.

As previous and subsequent incarnations of the Washington fish tax demonstrate, however, the State's legitimate objectives can be achieved through means that do not un-

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[5] United States v. Washington, *supra,* applies the principle developed in the *Puyallup* cases that States can regulate the exercise of treaty Indian fishing rights only if, and to the extent, required for conservation. Department of Game v. Puyallup Tribe, 414 U.S. 44, 48 (1973); Puyallup Tribe v. Department of Game, 391 U.S. 392, 398-399, 401 (1968). Washington has not argued that its fish excise tax promotes conservation in any way.

necessarily burden Indian commerce. The State could divide the tax equally between fish purchasers and taxable fishermen, as it did prior to 1978. *See* RCW 75.32 (1962) (imposing a two percent "privilege fee" on purchasers and a two percent "catch fee" on fishermen) discussed *supra* at 6. Or the State could extend the credit provisions of RCW 82.27.040 (1981) to include a credit for taxes paid by a purchaser or Indian treaty fisherman to a tribal government. *See* RCW 82.27.040 as it existed from 1980 through 1985 and as amended in 1985, discussed *infra* at 21-22 & n.14. The existence of these alternatives conclusively shows that Washington's challenged fish excise tax does not have the least burdensome effect on the exercise of Indian treaty fishing rights.

The decision below also conflicts with *United States v. Washington, supra,* in another way. Under the Ninth Circuit's rationale, measures adopted by States are subject to careful scrutiny to insure that there are no unnecessary adverse effects on the exercise of Indian treaty fishing rights. By contrast, under the decision below, States are free to regulate Indian treaty fishing provided that their measures operate in the first instance on non-Indians and that the associated economic burdens on Indian treaty fishing, no matter how severe, theoretically can be offset by Indian treaty fishermen "voluntarily" agreeing to accept a reduced price for their fish.

C. THIS CASE PRESENTS THE OPPORTUNITY TO ADDRESS IMPORTANT AND RECURRING ISSUES RAISED BY THE INDIAN COMMERCE CLAUSE.

The Indian Commerce Clause of the Constitution, quoted *supra* at 1, is "a shield to protect Indian tribes

from state and local interference." *Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 153-154 (1982). It prevents "undue discrimination against, or burdens on, Indian commerce." *Washington v. Confederated Colville Tribes,* 447 U.S. 134, 157 (1980). As noted by the Washington Supreme Court, however, "no clear and concise modern test for the validity of taxes affecting Indian commerce has been articulated by the United States Supreme Court." App. 10. This case presents an ideal opportunity for this Court to examine the Indian Commerce Clause and articulate standards for its application, just as it did for the Foreign Commerce Clause in *Japan Line Ltd. v. County of Los Angeles,* 441 U.S. 434 (1979).

There is very little mystery about the origin and purpose of the Indian Commerce Clause. Along with the other Indian provisions in the Constitution, it was aimed at correcting the confusion that existed under the Articles of Confederation between the authority of the States and the national government over the control and regulation of Indian affairs.

Article Nine of the Articles of Confederation granted Congress "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians," but then ambiguously exempted Indians who were "members of any of the States" and also made the power subject to the proviso "that the legislative right of any State within its own limits be not infringed or violated." As Madison wrote in *The Federalist No. 42,* these two limitations "render[ed] the provision obscure and contradictory."[6] Madison noted that the authority delegated to the

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6 *The Federalist No. 42,* at 275 (R. Luce ed. 1976) (J. Madison).

Congress under the Constitution "is very properly unfettered from [these] two limitations."[7] Freed of these restraints, Congress' power to regulate commerce with the Indian tribes under the Constitution incorporated the positive grant of authority under Article Nine of the Articles of Confederation, that is, "the sole and exclusive right and power of . . . regulating the trade and managing all affairs with the Indians."[8] As one noted scholar has commented concerning the history of the Indian Commerce Clause, "[t]he lack of debate on the question indicates, perhaps, how universally it was agreed that Indian affairs were to be left in the hands of the federal government." F. Prucha, *American Indian Policy in the Formative Years* 41 (1962). Accordingly, the Indian Commerce Clause should be strictly applied in a manner which precludes States from imposing undue burdens on, or unfair discrimination against, Indian commerce.

This Court should formulate standards to carry out the purpose of the Indian Commerce Clause. Cf. *Japan Line, Ltd. v. County of Los Angeles, supra,* 441 U.S. at 444-457. For example, state taxation or regulation of Indian commerce should not be permitted where their effect is to undermine Federal Indian policies or to negate tax

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[7] *Id.*

[8] This aspect of our constitutional history was reviewed by Chief Justice Marshall in his seminal opinion in Worcester v. Georgia, 31 U.S. (6 Pet.) 515, 558-559, 561 (1832). *See also,* United States v. Forty-Three Gallons of Whiskey, 93 U.S. 188, 194 (1876).

immunities or other advantages enjoyed by Indians or Indian tribes under federal law.[9] States should not be allowed to act in a manner that places articles of Indian commerce at a competitive disadvantage.[10] State taxation and regulation should be examined to insure that they do not have the effect of diminishing tribal sovereignty by foreclosing or effectively preempting appropriate action by tribal authorities.[11] The analysis under the Indian Commerce Clause also should take account of whether the State is able to eliminate any burden on, or discrimination against, Indian commerce by accomplishing its legitimate objectives in other, less intrusive ways.[12] Finally, state action should be scrutinized to insure that it is not motivated by discriminatory intent.[13]

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[9] *See, e.g.*, Three Affiliated Tribes v. Wold Engineering, 476 106 S. Ct. 2305, 2309-2310 (1986); New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 338 (1983); Tulee v. Washington, 315 U.S. 681 (1942).

[10] *See, e.g.*, Maryland v. Louisiana, 451 U.S. 725, 754 (1981); Japan Line, Ltd. v. County of Los Angeles, *supra*, 441 U.S. at 447-448; Boston Stock Exchange v. State Tax Comm'n., 429 U.S. 318, 325-328, 332 (1977).

[11] *See, e.g.*, Three Affiliated Tribes v. Wold Engineering, *supra*, 106 S. Ct. at 2313; National Farmers Union Insurance Co. v. Crow Tribe, 105 S. Ct. 2447, 2454 (1985); New Mexico v. Mescalero Apache Tribe, *supra*, 462 U.S. at 334-335 and n.17; Merrion v. Jicarilla Apache Tribe, *supra*, 455 U.S. at 149; Japan Line, Ltd. v. County of Los Angeles, *supra*, 441 U.S. at 446-448; Santa Clara Pueblo v. Martinez, 436 U.S. 49, 60-64 (1978).

[12] Three Affiliated Tribes v. Wold Engineering, *supra*, 106 S. Ct. at 2312-2315; Japan Line, Ltd. v. County of Los Angeles, *supra*, 441 U.S. at 446-454; Hunt v. Washington Apple Advertising Comm'n., 432 U.S. 333, 353-354 (1977); Tulee v. Washington, *supra*, 315 U.S. at 685.

[13] Hunt v. Washington Apple Advertising Comm'n., *supra*, 432 U.S. at 352; Boston Stock Exchange v. State Tax Comm'n., *supra*, 429 U.S. at 329-331.

Washington's fish excise tax fails to satisfy any of these standards. As acknowledged by the Washington Supreme Court, the tax circumvents the Indians' immunity, conferred by federal treaties, from state fish licensing fees. It also diminishes the value of fish caught by treaty Indian fishermen as compared to the nontreaty catch, subjects treaty Indian fishermen and purchasers of fish from treaty Indian fishermen to double taxes, and substantially diminishes the overall tribal tax base. As previously noted, the State's legitimate objectives can be, and were in fact, carried out without any adverse effects on Indian commerce under Washington's pre-1978 fish tax. Additionally, the 1978 change in Washington's tax clearly manifests its legislature's intent to subvert the tax immunity enjoyed by treaty Indian fishermen under federal law. The factual circumstances presented by the instant case therefore make it a suitable vehicle to address the important and recurring issue of the extent to which states can burden, regulate and tax Indian commerce.

In *Washington v. Confederated Colville Tribes,* 447 U.S. 134 (1980), this Court strongly suggested that the Indian Commerce Clause requires states to provide a credit for tribal taxes, where, as here, articles of Indian commerce "will actually be placed at a competitive disadvantage due to the overlapping impact of tribal and state taxation" and the Indian commerce is not predicated on being able to market a tax exemption. 447 U.S. at 157-158. *See also,* 447 U.S. at 169-172 (Brennan, J., concurring and dissenting), 175 (Stewart, J., concurring and dissenting). This important aspect of the Indian Commerce Clause, which has not been addressed in any case in this Court subsequent to *Washington v. Confederated Colville Tribes,*

is also presented by the instant case. From 1980 through 1985, the period covered by this litigation, Washington law allowed a credit for "any tax legally imposed and paid to another state by the taxpayer." Former RCW 82.27.040 (1981).[14] The absence of a comparable credit for taxes paid to Indian tribes is another manifestation of the manner in which Washington's fish excise tax unduly burdens and unfairly discriminates against Indian commerce.

D. WASHINGTON'S FISH TAX RAISES A SIGNIFICANT EQUAL PROTECTION ISSUE.

If, contrary to the Washington Supreme Court's assumption, the economic burden of Washington's fish tax is not, or cannot be, passed on to treaty Indian fishermen, then the tax violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

The pass-through provision of RCW 82.27.020(2) (1981) creates two classifications of fish purchasers: those who buy from non-treaty fishermen and those who buy from treaty Indian fishermen. By allowing purchasers to deduct half of the tax from the price paid to fishermen, the State benefits those who purchase from non-treaty fishermen by allowing them to reduce their tax burden by half. By contrast, the taxing scheme in-

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[14] In 1985, the Washington legislature amended RCW 82.27.040 by allowing a credit for "any tax previously paid on that same enhanced food fish to any other legally established taxing authority." There has not yet been a determination of the extent, if any, to which the 1985 amendment allows credits for tribal taxes. Any issues raised by the 1985 amendment are, of course, beyond the scope of this litigation which is limited to tax refunds for the 1980-1983 period.

creases the cost of buying fish from treaty Indian fishermen.

The fundamental principle of equal protection requires that States treat those who are similarly situated similarly. *Louisville Gas & Electric Co. v. Coleman*, 277 U.S. 32, 37 (1928). While the Fourteenth Amendment accords States great latitude in creating classifications for tax purposes, *see, e.g., Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 526-527 (1959), it also requires that the classifications created by the State be "reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation." *Louisville Gas & Electric Co., supra*, 277 U.S. at 37.

There is no rational basis for the imposition of a heavier tax burden on purchases of treaty Indian fish than on purchases of non-treaty fish.[15] The Equal Protection

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[15] The Washington Supreme Court's rejection of High Tide's equal protection argument was based on the fact that the tax places an equal economic burden on all fish sales. App. 9-10. This overly simplistic approach elevates form over substance by ignoring the real world difference between the way in which the tax affects purchases from treaty and non-treaty fishermen. Moreover, as this Court has recognized, equal protection principles frequently take on a somewhat different look in the unique Indian setting to take account of the special rights and benefits conferred by treaty. Washington v. Fishing Vessel Ass'n., *supra*, 443 U.S. at 673 n.20 and cases therein cited. *See also*, Three Affiliated Tribes v. Wold Engineering, *supra*; Fisher v. District Court, 424 U.S. 382, 390-391 (1976) (per curiam).

Clause of the Fourteenth Amendment protects individuals from State action which subjects them to taxes not imposed on others of the same class. *Hillsborough Township v. Cromwell,* 326 U.S. 620 (1946). Pursuant to the tax authorized by RCW 82.27.020 (1981), Washington singles out purchases of treaty Indian fish and subjects them to a greater tax burden than purchases of non-treaty fish. The only factor that distinguishes the classifications created by the taxing scheme is the rights of the party from whom the fish are bought. The Equal Protection Clause of the Fourteenth Amendment surely should forbid classification based on rights secured by federal treaties. Because the Washington fish taxing scheme results in that classification, it can not survive scrutiny under the Fourteenth Amendment.

CONCLUSION

The questions presented by this case obviously are substantial and require plenary consideration. The decision below also conflicts with the decisions of this Court and the United States Court of Appeals for the Ninth Circuit. Probable jurisdiction should be noted and the decision below should be reversed.

Respectfully submitted,

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December 1986

APPENDIX A

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

52590-1

En Banc

HIGH TIDE SEAFOODS, a partnership; JAMES L. SHEFLER, as his separate estate; and ERNEST J. VAIL, a single person,

Appellants,

v.

THE STATE OF WASHINGTON; THE STATE OF WASHINGTON DEPARTMENT OF REVENUE; and the DIRECTOR OF REVENUE,

Respondents.

(Filed September 11, 1986)

DOLLIVER, C.J.—Plaintiffs challenge the legality and constitutionality of Washington's tax on enhanced food fish and request a refund for all taxes paid between July 1, 1980, and March 31, 1983, under RCW 82.27. Plaintiffs appeal from a summary judgment awarded in favor of the State of Washington dismissing their claim.

Plaintiff High Tide Seafoods is a Washington partnership. Plaintiffs James L. Shefler and Ernest J. Vail are its sole owners. Plaintiffs are engaged in the business of purchasing fresh salmon from fishermen, processing the fish, and wholesaling them to third parties. The salmon is purchased from both treaty Indians and nontreaty fishermen.

Pursuant to RCW 82.27, plaintiffs collected and paid excise taxes of $153,041.13 for the period from July 1,

1980, through March 31, 1983. In purchasing salmon from nontreaty fishermen, plaintiffs deducted from the purchase price an amount equal to a tax at one-half the rate levied under RCW 82.27.020 as allowed by RCW 82.27.020(2). Pursuant to the federal law, plaintiffs did not deduct that same amount in purchasing salmon from treaty Indian fishermen (an amount of $97,852.79).

Plaintiffs petitioned the Department of Revenue for a refund of one-half of the tax amount paid to treaty Indian fishermen for salmon purchases. Plaintiffs' refund request was denied by the Department in the determination in In re High Tide Seafoods, No. 82-128 (May 26, 1982) and in the final determination in In re High Tide Seafoods, No. 82-128A (Nov. 16, 1982). Plaintiffs appealed the Department's decision to Thurston County Superior Court seeking a refund of *all* fish tax paid, with interest, and declaratory and injunctive relief. They requested a judgment finding the taxes imposed by RCW 82.27 unlawful and enjoining the State from imposing and collecting the tax authorized by RCW 82.27. Plaintiffs moved for summary judgment; but the trial court continued adjudication of the matter pending our decision in *Department of Fisheries v. DeWatto Fish Co.*, 100 Wn.2d 568, 674 P.2d 659 (1983).

Following the decision in *DeWatto*, both sides moved for summary judgment. The trial court entered an order granting summary judgment in favor of the State of Washington and denied the plaintiffs' similar motion. Plaintiffs' appeal was transferred to us pursuant to RAP 4.3.

Plaintiffs raise numerous legal and constitutional issues regarding RCW 82.27, the tax on enhanced food fish.

These issues are approximately the same issues plaintiffs raised as amici curiae in the *DeWatto* case and which were not necessary to reach. Although we were interpreting the previous fish tax statute (former RCW 75.32), the holdings in *DeWatto* still cover and control most of the issues in the instant case. We affirm summary judgment awarded in favor of the State of Washington.

RCW 82.27 replaced the former fish tax statute. It is a single excise tax and encompasses no sales tax and no sales tax credit provision. Persons liable for the tax, however, still may pass on to their sellers one-half of the economic burden of the tax. RCW 82.27.020(2). Plaintiffs concede the tax impact of RCW 82.27 upon them is the same as the tax impact of former RCW 75.32.

Statutes are presumed constitutional and a party challenging a statute has the burden of establishing its invalidity beyond a reasonable doubt, as well as rebutting the presumption that all legally necessary facts exist. *Higher Educ. Facilities Auth. v. Gardner,* 103 Wn.2d 838, 843, 699 P.2d 1240 (1985). A statute, if possible, should be construed to be constitutional. *State v. Moore,* 79 Wn.2d 51, 58, 483 P.2d 630 (1971). The issues which follow are plaintiffs' challenges to the statute in effect between 1980 and 1983.

I

Plaintiffs claim RCW 82.27 is a property tax because the tax is levied upon the owner's "ownership" of the fish. RCW 82.27.020(1). They argue that as a property tax it fails to meet the requirements of Const. art. 7, §§ 1 and 2 because it is not a uniform tax. The state claims the tax is properly an excise tax because the tax is imposed upon

an owner's exercising control over the fish for "commercial" purposes. We agree with the State.

RCW 82.27.020(1) provides:

> In addition to all other taxes, licenses, or fees provided by law there is established an *excise tax* on the possession of food fish and shellfish for commercial purposes as provided in this chapter. The tax is levied upon and shall be collected from the owner of the food fish or shellfish whose possession constitutes the taxable event. The taxable event is the first possession by an owner after the food fish or shellfish have been landed. Processing and handling of food fish and shellfish by a person who is not the owner is not a taxable event to the processor or handler.

(Italics ours.) *See* Laws of 1980, ch. 98, § 2, p. 303.

This court distinguished a property tax from an excise tax in *Black v. State*, 67 Wn.2d 97, 406 P.2d 761 (1965). In *Black*, we defined a property tax as a tax on things tangible or intangible and an excise tax on the right to use or transfer things. *Black*, at 99. The tax in *Black* involved a tax on the leasing of tangible personal property and was held to be an excise tax, not a property tax.

> [T]he obligation to pay an excise is based upon the voluntary action of the person taxed in performing the act, enjoying the privilege or engaging in the occupation which is the subject of the excise, and the element of absolute and unavoidable demand, as in the case of a property tax, is lacking.

Black, at 99 (quoting 1 T. Cooley, *Taxation* § 46, at 132 (4th ed. 1924)).

If a tax is imposed on the value of the property, it may be a property tax. If levied upon the privilege of

doing business, it is an excise tax. *Clifford v. State*, 78 Wn.2d 4, 469 P.2d 549 (1970). A tax for the beneficial use of property as distinguished from a tax on property itself has long been established law. *United States v. Detroit*, 355 U.S. 466, 2 L. Ed. 2d 424, 78 S. Ct. 474 (1958).

In this case, the fish tax is not imposed merely by reason of ownership or possession of the fish. RCW 82.27.020(1) refers to the tax imposed as an excise tax with the first possession by an owner as the taxable event. This "owner" becomes liable for the fish tax by exercising control over the fish for commercial purposes. Plaintiffs cite *Jensen v. Henneford*, 185 Wash. 209, 53 P.2d 607 (1936) for the proposition that because ownership is the taxable event the fish tax is a property tax. Besides being somewhat modified by more contemporary cases (*see, e.g., P. Lorillard Co. v. Seattle*, 83 Wn.2d 586, 521 P.2d 208 (1974); *Cary v. Bellingham*, 41 Wn.2d 468, 250 P.2d 114 (1952)), this court also stated in *Jensen* that when a tax is levied for the exercise of a privilege granted or permitted by the state, it may be considered an excise tax. *Jensen v. Henneford, supra* at 218. The event causing this food fish tax to be levied is the *transfer* of ownership from the fisherman to the fish purchaser. It is not based just on the ownership of the fish.

Plaintiffs set forth no convincing authority which would classify the tax in RCW 82.27 as a property tax. The tax is imposed upon an owner's exercising control over fish for purposes of disposing of them for profit, and as such, it is an excise tax and is not subject to the uniformity requirements of Const. art. 7, §§ 1 and 2.

II

Plaintiffs claim the present tax is an unlawful delegation of the Legislature's taxing authority because it allows the person liable for the fish tax to choose whether to deduct one-half of the tax levied from the price paid to the nontreaty fishermen. We do not agree.

Plaintiffs point out that RCW 82.27.020(2) provides a person in possession of food fish "*may deduct* from the price paid to the person from which such food fish . . . [is] purchased an amount equal to a tax at one-half the rate levied in this section upon these products." (Italics ours.) While this is true, the owner whose first possession of the food fish constitutes the taxable event is liable for the tax. That person alone is responsible for the tax regardless of whether a deduction is taken pursuant to RCW 82.27.020(2). "[T]he tax is levied upon and shall be collected from the owner of the food fish . . . whose possession constitutes the taxable event." RCW 82.27.020(1). This is the legislative authority to impose the tax which is nondelegable. *See* 1 T. Cooley, *Taxation* § 78, at 193-94 (4th ed. 1924). The language cited by plaintiffs merely allows the parties liable for the tax to pass on to their sellers part of the burden of the tax; it does not trench upon the legislative function.

The Legislature has established a clear tax structure for liability. The tax is not discretionary; the first owner of the fish is liable for the full amount of the tax. No legislative power or authority is granted by RCW 82.27 to a taxpayer.

III

The State claims plaintiffs lack standing to raise issues regarding violations of the Indian treaty rights, freedom of association, equal protection, and Indian commerce clause because plaintiffs' contentions are based solely on assertions of the rights of third parties. The State argues that unless plaintiffs show they are harmed by the statute *and* are within the zone of interests protected by the guaranties at issue, they cannot challenge the validity of the statute. The plaintiffs claim they have standing to raise these issues, especially since the statute will encourage taxpayers to reduce the price they pay to treaty Indian fishermen thereby rendering RCW 82.27 unconstitutional.

The prevailing rule requires a person or party seeking to challenge the constitutionality of a law, on behalf of itself or a representative class, to show that the particular action complained of has operated to the person's or party's own prejudice. *Wenatchee Reclamation Dist. v. Mustell,* 102 Wn.2d 721, 727, 684 P.2d 1275 (1984). Thus, for a plaintiff to receive "standing" to bring a lawsuit, it must allege a personal injury fairly traceable to the challenged conduct and likely to be redressed by the requested relief. *Allen v. Wright,* — U.S. —, 82 L. Ed. 2d 556, 104 S. Ct. 3315 (1984); *Grove v. Mead Sch. Dist. 354,* 753 F.2d 1528 (9th Cir. 1985). If a plaintiff lacks standing to bring a suit, courts lack jurisdiction to consider it. *Grove v. Mead Sch. Dist. 354, supra.*

Plaintiffs raise issues regarding the validity of the food fish tax claiming they suffer economic and constitutional injuries because they cannot deduct a portion of their excise tax when they buy fish from treaty Indian fishermen. Even

if plaintiffs can show injury, they will not be able to prove their injury falls within the zone of the fishing rights of treaty Indians. Plaintiffs do not have standing to challenge RCW 82.27 by asserting treaty rights of Indians.

IV

Plaintiffs do appear, however, to have standing regarding their issues of freedom of association, equal protection, and Indian commerce clause because a pecuniary interest is involved. Although the State claims plaintiffs raise these issues merely as a camouflage to raise the Indian treaty rights issue which plaintiffs do not have standing to raise, to forgo consideration of the constitutional merits of a statute and to wait for a new challenge by injured third parties would foster repetitive and time-consuming litigation under the guise of caution and prudence. *Craig v. Boren,* 429 U.S. 190, 193-94, 50 L. Ed. 2d 397, 97 S. Ct. 451 (1976). Thus, although plaintiffs' arguments, in light of *Department of Fisheries v. DeWatto Fish Co.,* 100 Wn.2d 568, 674 P.2d 659 (1983) are tenuous at best, we will resolve them now.

Freedom of Association

Plaintiffs claim because they cannot deduct half of their excise tax liability when buying fish from treaty Indian fishermen, they are discouraged from dealing with treaty Indian fishermen. This, plaintiffs assert, causes an impermissible "chilling effect" on their First Amendment right of freedom of association.

Freedom of association does not guarantee the right to engage in business free from taxation. Even if a tax tangentially impacts First Amendment protections, it can nonetheless be valid. *Sears, Roebuck & Co. v. Department of Rev.,* 97 Wn.2d 260, 643 P.2d 884, *appeal dismissed,* 459 U.S.

803 (1982). RCW 82.27 does not prohibit, regulate, or interfere with any associational activities of the plaintiffs.

Equal Protection

Plaintiffs claim their equal protection guaranties are violated because RCW 82.27 treats a fish purchaser purchasing fish from treaty Indian fishermen in a less favorable manner than it treats a fish purchaser purchasing fish from nontreaty fishermen. We do not agree.

The Washington Court of Appeals held the statutory scheme of the old food fish tax (former RCW 75.32) did not create a classification which violated the equal protection clauses of the state and federal constitutions. *Sea-Pac Co., Inc. v. Department of Fisheries,* 30 Wn. App. 659, 638 P.2d 92 (1981), *review denied,* 97 Wn.2d 1010 (1982). In *Sea-Pac,* the old food fish tax was challenged alleging equal protection guaranties were violated because a greater tax was imposed on purchases from treaty fishermen than was imposed on purchases from nontreaty fishermen. However, focusing on the tax scheme as a whole, the Court of Appeals found no violation occurred under former RCW 75.32; the "original receiver's" privilege tax was assessed equally upon all "original receivers" regardless of where or by whom the fish were caught. All original receivers could deduct the amount of taxes collected from the fishermen from their privilege tax and no deductions were allowed in their privilege tax for fish purchased from nontaxpaying treaty Indians. The court held RCW 75.32 did not create a classification which resulted in the violation of the equal protection clause of the state and federal constitutions.

The present food fish tax scheme operates in a similar manner. All "'owners" may deduct one-half of their excise

tax from nontreaty fishermen and no deductions are allowed for fish purchased from treaty Indians. The decision in *Sea-Pac* is consistent with this court's finding in *DeWatto*. In *DeWatto*, this court found the former food fish tax placed an equal economic burden on all fish sales regardless of when or from whom the fish was purchased. *DeWatto*, at 578. RCW 82.27 creates a similar tax scheme; it does not violate any equal protection guaranties.

Indian Commerce Clause

Plaintiffs claim RCW 82.27 discriminates against the Indian interstate commerce clause (U.S. Const. art. 1, § 8), is not fairly apportioned, and does not fairly relate to services provided by the State. The State maintains the holding in *DeWatto* controls and that there is no Indian commerce clause violation. We agree. Parenthetically we note concurrence with the position of the State that plaintiffs have no case under the commerce clause, U.S. Const. art 1, § 8. We also note plaintiffs' contention that the four criteria which a state tax affecting interstate commerce must meet to be valid (*Department of Rev. v. Association of Wash. Stevedoring Cos.*, 435 U.S. 734, 750, 55 L. Ed. 2d 682, 98 S. Ct. 1388 (1978); *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279, 51 L. Ed. 2d 326, 97 S. Ct. 1076 (1977)) also apply to Indian commerce. As we said in *DeWatto*, while state taxes which discriminate against Indian commerce are prohibited, no clear and concise modern test for the validity of taxes affecting Indian commerce has been articulated by the United States Supreme Court. However, even if we were to adopt the interstate commerce clause analysis, plaintiffs' arguments as to the fair apportionment and state services test have no merit and we need not dis-

cuss them further. We do, however, consider in some detail whether the tax is discriminatory.

State taxes which discriminate against Indian commerce are invalid. *DeWatto,* at 572. The commerce clause does not bar all state taxation of matters touching the economic interests of Indian tribes, but only prohibits undue discrimination against, or burdens on, Indian commerce. *Washington v. Confederated Tribes,* 447 U.S. 134, 65 L Ed. 2d 10, 100 S. Ct. 2069 (1980). A tax is not discriminatory so long as parties have the opportunity to allocate the burden among themselves by adjusting the price. *Washington v. United States,* 460 U.S. 536, 541-42 n.4, 75 L. Ed. 2d 264, 103 S. Ct. 1344 (1983). A shift of the legal incidence of tax from a tax exempt party to a taxable party to assure equal tax is collected is not discriminatory in a constitutional sense. *United States v. County of Fresno,* 429 U.S. 452, 50 L. Ed. 2d 683, 97 S. Ct. 699 (1977).

We have held there is no discrimination so long as overall tax receipts are the same regardless of which parties are involved in the transaction *and* the parties have an opportunity to allocate the tax burden among themselves. *DeWatto,* at 572. We found no discrimination existed under the similar "old food fish tax" scheme because an equal economic burden was placed on *all* fish sales regardless of where or from whom the fish was purchased. *DeWatto,* at 572. This holding is consistent with the present food fish tax scheme. Just because a fish purchaser cannot deduct one-half of the excise tax from a treaty Indian fisherman, any negotiation on the fish price to allocate some of the burden of the tax does not result in discrimination. This is merely the "freedom of the marketplace"; no direct com-

mercial advantage is provided to nontreaty Washington fishermen.

Although some of the tax categories and names have changed with RCW 82.27, the scheme remains the same. A fish purchaser is still free to negotiate the price of the fish with a treaty Indian, and the treaty Indian is capable of receiving approximately the same amount as taxable nontreaty fishermen.

The analysis used in *DeWatto* is helpful to illustrate the circumstances of the present tax. Assume a fish purchaser buys a salmon from a nontreaty fisherman for $10. The purchaser may deduct from this price one-half of the excise tax of 5 percent, or $0.25, thereby paying the fisherman a net price of $9.75. The fish purchaser owes the State an excise of 5 percent or $0.50, resulting in a total cost for that Chinook of $10.25.

Next, assume the fish purchaser buys an identical fish from a treaty Indian fisherman. Because the purchaser cannot deduct a portion of the excise tax in its purchase from the treaty Indian, the purchaser will pay the full excise tax of $0.50 to the State.

The tax is the same in both instances, and depending on the economic forces operating in the fish market, the purchaser may pass part or all of the tax burden to the nontaxable fisherman. For example, if the fish purchaser wishes to offer $9.75 for the same salmon, the nontaxable fisherman would receive the same net price as the previous taxable fisherman. With the tax remaining approximately the same (always 5 percent for Chinook salmon, RCW 82.27.020(4)(a)), the total cost for the purchaser, tax in-

cluded, would equal the amount paid for the fish from the taxable fisherman.

As the court stated in *Department of Fisheries v. DeWatto Fish Co.*, 100 Wn.2d 568, 572, 674 P.2d 659 (1983):

> That the identity of the party bearing the legal incidence of the tax shifted to reflect the fact that certain parties were not subject to state taxation is of no practical or constitutional significance since the total tax rate remained equal and the parties had the opportunity to allocate the burden among themselves.

The tax imposed by RCW 82.27.020(1) is constitutional. The trial court is affirmed.

/s/ Dolliver, C.J.
Brachtenbach, J.
Andersen, J.
Pearson, J.
Dore, J.
Callow, J.
Goodloe, J.
Durham, J.
Hamilton, J. Pro Tempore

Utter, J., did not participate in the disposition of this case.

APPENDIX B

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	FINAL DETERMINATION
HIGH TIDE SEAFOOD	)	No. 82-128A
P. O. Box 2141 Port Angeles, Washington 98362	)	Registration No. C600 238 737

FACTS:

High Tide Seafood (taxpayer) is a partnership engaged in the business of purchasing fresh salmon from both treaty Indian fishermen and non-treaty fishermen, processing the fish, and wholesaling the fish to third parties.

The taxpayer has appealed the issue of its liability for certain taxes imposed by Chapter 82.27 RCW (excise tax on food fish and shellfish) considered in Determination No. 82-128 by Chief Hearings Examiner DeLoss H. Brown. The taxpayer requests a refund of one-half of the excise tax which it has paid upon its purchases of fish from treaty Indian fishermen since July 1, 1980.

The taxpayer's position is summarized in its Notice of Appeal and Memorandum of Support of Appeal, dated June 14, 1982.

TAXPAYER'S EXCEPTIONS:

The excise tax on food fish and shellfish is imposed by RCW 82.27.020 on

> . . . the owner of the food fish or shellfish whose possession constitutes the taxable event. The taxable event is the first possession by an owner after the food fish or shellfish have been landed.

Thus, the incidence of the excise tax falls upon the purchaser of the food fish or shellfish; i.e., the first possessor after the fish have been landed. The statute goes on to provide the purchaser with a credit system as follows:

> A person in possession of food fish or shellfish and liable to [pay] this tax *may* deduct from the price paid to the person from which such food fish or shellfish (except oysters) are purchased an amount equal to a tax at one-half the rate levied in this section upon these products. (Emphasis and bracketed inclusion supplied.)

The taxpayer has reported all purchases to the Department of Revenue. With respect to non-Indian fishermen, the taxpayer has deducted from the purchase price an amount equal to one-half the tax. However, it has not deducted one-half of the excise tax on purchases from treaty Indian fishermen and has paid the full amount of the tax due on these transactions.

In each quarterly return filed with the Department since July 1, 1980, the taxpayer has requested a refund of those amounts which it is not allowed to deduct from purchases from treaty Indian fishermen. The total amount for which the taxpayer seeks a refund is now $39,103.04, plus interest.

Determination No. 82-128, issued May 26, 1982, relied on Sea-Pac, Inc. v. Dept. of Fisheries, 30 Wn. App. 659 (1981), and held that the taxpayer itself was the first possessor of the fish and therefore liable for the tax. Thus, the request for refund was denied. This appeal followed.

The taxpayer contends that Determination No. 82-128 is in error for a number of reasons:

1. Chapter 82.27 RCW is an unlawful delegation of the taxing power. This is because it permits private

persons to assess and collect a tax on fishermen subject only to their own discretion.

2. Purchasers who deal with treaty Indian fishermen must pay a greater excise tax than those who do not. Thus, Chapter 82.27 RCW violates the equal protection guarantees of the United States and Washington Constitutions.

Thus, the taxpayer believes that it is entitled to a tax refund, plus interest, for those taxes paid in behalf of treaty Indian fishermen.

DISCUSSION:

We have carefully reviewed all of the taxpayer's arguments, but conclude that Determination No. 82-128 reaches a correct decision.

While RCW 82.27.020 does use the word "may," it does not give purchasers of fish products discretionary taxing authority. Rather, it allows those persons liable for the tax the discretion to pass on to the fish sellers a portion of the cost of the tax. There is no prohibition against an Indian paying a portion of the cost of his customer's tax obligation. Thus, we do not consider the fish excise tax to be a tax on treaty Indian fishermen.

Under RCW 82.27.020(1), the tax is clearly "levied upon and shall be collected from the owner of the food fish or shellfish whose possession [shall constitute] the taxable event." The "taxable event" is statutorily defined as "the first possession by an owner after the food fish or shellfish have been landed."

Under RCW 82.27.020(2), the taxpayer is not *required* to collect the fish excise tax from Indian or non-Indian fish-

ermen. Instead, the taxpayer is merely *permitted* to deduct from the price paid to a supplier an amount equal to one-half of the tax levied upon the product.

The fish excise tax is levied on the owner of the fish whose possession constitutes the taxable event. Consequently, the purchase price is negotiable since full payment of the tax by the purchaser is expected under Chapter 82.27 RCW. This is not unlike the situation presented with the business and occupation tax (Chapter 82.04 RCW). While RCW 82.04.500 mandates that that tax not be placed upon purchasers or consumers and that it be a part of the operating overhead of the business, it nevertheless is indirectly paid by purchasers of goods or services.

On the other hand, the fish excise tax allows a purchaser the option of passing one-half of the tax on to its supplier through a deduction in the price paid. This option is available with respect to both Indian and non-Indian suppliers alike. If this is not possible, as in the case here of a treaty Indian seller, the purchaser is free to negotiate the purchase price knowing full well that it is liable for the taxes imposed by Chapter 82.27 RCW. See Sea-Pac, supra.

Thus, we do not see that the legislature has created an unlawful delegation of taxing authority. The tax is imposed on the first possessor of food fish and shellfish. That person may pass on one-half of the cost of the tax to its suppliers. It may not choose to do this. In any event, the purchaser will remain liable for one hundred percent of the tax under RCW 82.27.020.

Finally, the Department of Revenue is without authority to declare an act of the legislature unconstitutional. As an administrative agency of the State of Washington, the De-

partment is required to presume both the constitutionality and legal validity of the laws it administers. Chapter 82.27 RCW must therefore be declared valid unless ruled otherwise by the judgment of a court of record not appealed from.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is once again denied.

DATED this 16th day of November, 1982.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE

/s/ Don R. McCuiston,
Assistant Director

APPENDIX C

BEFORE THE DEPARTMENT OF REVENUE
OF THE STATE OF WASHINGTON

In the Matter of the Petition For Refund of	)	DETERMINATION
	)	No. 82-128
HIGH TIDE SEAFOOD P. O. Box 2141 Port Angeles, Washington 98362	)	Registration No. C600 238 737

FACTS:

Since July 1, 1980 RCW 82.27.020 has imposed an excise tax

> . . . on the possession of food fish and shellfish for commercial purposes as provided in this chapter. The tax is levied upon and shall be collected from the owner of the food fish or shellfish whose possession constitutes the taxable event. The taxable event is the first possession by an owner after the food fish or shellfish have been landed.

The effect of Chapter 82.27 RCW was to repeal previously imposed privilege fees and fish sales taxes on food fish and shellfish (Chapter 75.32 RCW) and to transfer responsibility for collection of the "Tax on Food Fish and Shellfish" from the state Department of Fisheries to the state Department of Revenue. The new law also provides that

> . . . a person in possession of food fish and shellfish and liable to this tax may deduct from the price paid to the person from which such food fish or shellfish (except oysters) are purchased an amount equal to a tax at one-half the rate levied in this section upon these products.

High Tide Seafoods has, from the effective date of the new law, paid the entire amount of tax due on its purchases of food fish and shellfish. The portion of the tax paid

representing tax due on purchases from treaty Indian fishermen has been paid under protest and the taxpayer petitions for a refund of such amounts and relief from any future obligation to pay such taxes.

TAXPAYER'S EXCEPTIONS:

The taxpayer suggests RCW 82.27 is "violative of the equal protection guarantees of both the State and Federal Constitutions." (Sea-Pac, Inc. v. Dept. of Fisheries, Superior Court, Whatcom County, March 13, 1980.) The thought being that treaty Indians are immune to state taxation and therefor food fish and shellfish purchasers from treaty Indian suppliers are "... unable to deduct any portion of the excise tax from treaty Indian sales." The taxpayer further states that

> ... the result of the new tax is identical to that under the previous statute: the more a purchaser deals with treaty Indians, the more its excise tax to the State of Washington.

The taxpayer contends "... the State is attempting to do indirectly what it cannot do directly," i.e., tax treaty Indians on Indian fishing activities.

The taxpayer questions even the availability of a choice of recovering the excise tax in question when dealing with treaty Indians and states:

> Although the word "may" in RCW 82.27.020(2) implies a choice, in actuality no discretion to withhold one-half of the excise tax from treaty Indian sales exists. To do so would violate federal law. The inclusion of the word "may" does not alleviate the unconstitutional application of this taxing scheme. Because purchasers are prohibited under federal law to

> apply a state tax to treaty Indian fishing, they must pay a higher excise tax.

In summary the taxpayer states:

> If the state wanted to impose an excise tax on the petitioner, without more, the tax would be permissible. However, the State has provided an option for a reduced tax for those purchasers who deal with nontreaty fishermen. There is no rational basis for requiring a purchaser dealing with treaty Indian fishermen to pay a greater excise tax than those who do not deal with such fishermen. High Tide is entitled to a tax refund, plus interest, for those payments made on behalf of treaty Indian fishermen.

DISCUSSION:

We note first that the Washington Court of Appeals in Sea-Pac Co. Inc. v. Dept. of Fisheries, 30 Wn App 659, reversed the judgment of the Whatcom County Superior Court and sustained the previously imposed privilege fees and fish sales taxes (Chapter 75.32 RCW) paid to the State for fish purchased from treaty Indians. The Court reasoned that

> Original receivers who purchase from nontaxpaying treaty Indians are free to negotiate the price, knowing that they must pay a full privilege fee.

Aside from this fact, however, the taxpayer errs in assuming the payments of tax made to date represent payments made on behalf of treaty Indian fishermen. The tax is clearly "levied upon and . . . collected from the owner of the food fish whose possession constitutes the taxable event." The "taxable event" is defined to be ". . . the first possession by an owner after the food fish or shellfish have been landed." Thus, the Department of

Revenue has not required High Tide Seafoods to collect a food fish shellfish excise tax (fish tax) from tribal Indian fisherman suppliers. The fish tax is no longer levied in terms of privilege fees or as a sales tax on food fish and shellfish, but rather is an excise tax levied on the owner of fish whose possession is the taxable event. The new law permits persons liable for the tax to deduct from the price paid to a supplier an amount equal to one-half the rate of tax levied upon the product. The deduction is obviously not mandatory. In those situations where it is not possible to "pass on" the tax, as would be the case when the supplier is a treaty Indian fisherman, the taxpayer is free to negotiate the purchase price with the full expectation of payment of the tax imposed by chapter 82.27 RCW.

DECISION AND DISPOSITION:

The taxpayer's petition for refund is hereby denied.

DATED this 26th day of May, 1982.

STATE OF WASHINGTON
DEPARTMENT OF REVENUE

/s/ DeLoss H. Brown,
Chief Hearings Examiner

APPENDIX D

AMENDMENT TO AN ORDINANCE TO GOVERN AND REGULATE FISHING IN THE QUILEUTE RIVER UNDER THE JURISDICTION OF THE QUILEUTE INDIAN TRIBAL COUNCIL, OF THE QUILEUTE INDIAN RESERVATION, STATE OF WASHINGTON.

WHEREAS, The Quileute Indian Tribe is an Indian Tribe organized under the Indian Reorganization Act; and the Quileute Tribal Council is the duly constituted governing body of the Quileute Indian Tribe by authority of Article III of the Constitution and By-Laws of the Quileute Indian Tribe, approved by the Secretary of the Interior on November 11, 1936; and,

WHEREAS, The Quileute Tribal Council desires to amend an Ordinance to Govern and Regulate Fishing on the Quileute River Under the Jurisdiction of the Quileute Indian Tribal Council, of the Quileute Indian Reservation, State of Washington, as herein set forth:

NOW THEREFORE BE IT RESOLVED THAT, The Quileute Tribal Council amends an Ordinance to Govern and Regulate Fishing in the Quileute River Under the Jurisdiction of the Quileute Indian Tribal Council of the Quileute Indian Reservation, State of Washington, as follows:

Revise Section Ten (10) to read:

(10) In the interest of the Quileute Tribe and its members who are entitled to treaty fishing rights in all usual and accustomed grounds in the ceded area, the following percentage of all commercial fishing receipts shall be collected from all Indian commercial fishermen, and paid to

the Treasurer of the Quileute Tribal Council. The funds so received are to be expended to compensate tribal attorneys to defend and enforce treaty fishing rights. The royalty or percentage to be collected from such commercial fishermen shall be one cent (1¢) per pound for fish sold or disposed of in any commercial form. Such royalty or percentage is to be collected by all fish buyers operating on the Quileute Indian Reservation, and shall be paid within fifteen days from the end of each calendar month the taxes were collected.

Passed by the Tribal Council this 21st day of April, 1983, and signed in authentication of its passage this 21st day of April, 1983.

/s/ Russell Woodruff, Sr.
Chairman, Quileute Tribal
Council

APPENDIX E

HOH TRIBAL BUSINESS COMMITTEE
OF THE
HOH INDIAN TRIBE

***** *SPECIAL CONDITIONS* *****

1. A *$50.00* permit fee must be paid to the Hoh Tribe upon receipt of this license.

2. A tax of *$.03* per pound must be paid to the Hoh Tribal Business Committee for each pound of fish purchased. This tax is payable on a *Weekly* basis.

3. A weekly report of number, weight and species purchased must be submitted to the Hoh Tribal office by the license holder or his authorized representative.

4. The Hoh Tribal Business Committee or their authorized representative reserves the right to make periodic inspections of the permittees fish purchasing operations, which include receiving tickets upon request.

5. In order to be consistant with established fish buying procedures, it will be necessary for the Fish Co. to agree to the above special conditions.

Date: December 3, 1984

Supreme Court, U.S.
FILED
JAN 23 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-960

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1986

HIGH TIDE SEAFOODS, *et al.*,

Appellants,

v.

STATE OF WASHINGTON, *et al.*,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

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No. 86-960

IN THE

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OCTOBER TERM, 1986

HIGH TIDE SEAFOODS, *et al.*,

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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

MOTION TO DISMISS OR AFFIRM

Appellees, State of Washington, et al., move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Washington Supreme Court. This motion is based on the failure of this appeal to present a substantial federal question, as well as jurisdictional deficiencies in the appeal.

STATEMENT OF THE CASE

High Tide Seafoods, a partnership composed solely of non-Indians, challenges the validity of Washington's tax on the possession of food fish for commercial purposes, as

applied to High Tide's possession of fish purchased from treaty Indians. We begin by briefly describing the tax and its application to High Tide. We then turn to a discussion of the nature of High Tide's claim and the treatment of that claim by the Washington Supreme Court. Finally, in the argument portion of this motion, we demonstrate that this appeal presents no substantial federal question.

A. WASHINGTON'S FISH TAX

Washington's fish tax is embodied in Chapter 82.27 Wash. Rev. Code.[1] It is a single excise tax uniformly imposed upon all businesses such as High Tide, which deal in fish for commercial purposes. The measure of the tax is the value of the fish, typically determined by the sales price. The rate of the tax is a statutorily stated percentage which varies only with the species of the fish. The tax applies at an equal rate and measure to all purchasers of fish for commercial purposes, without regard to the identity of the person from whom the fish are acquired. The legal incidence of the tax is the first possession by an owner for commercial purposes, after the fish have been landed. As the Washington Supreme Court ruled:

> * * * the owner whose first possession of the food fish constitutes the taxable event is liable for the tax. That person alone is responsible for the tax. * * * (J.S. App. 6)

Washington's fish tax also provides in Wash. Rev. Code § 82.27.020(2) that a person liable for the tax, such as High Tide, "may deduct" from the price paid to the person from whom the fish are acquired "an amount equal to a tax

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[1]Chapter 82.27 Wash. Rev. Code has been amended in several significant respects since the period involved in this case, *i.e.*, July 1, 1980 through March 31, 1983. To the extent those amendments have bearing on this case, they will be noted in this motion. Absent such notation, we describe the tax as it existed during the above referenced period for which High Tide seeks a refund.

at one-half the rate" levied by the statute.[2] In rejecting one of High Tide's various challenges to this tax on state law grounds—*i.e.*, that this provision constitutes an unlawful delegation of taxing authority, the Washington Supreme Court concluded that this provision of the statute entails no taxing authority at all, and instead merely recognizes an obvious economic reality, *i.e.*, that the parties liable for the tax may have the opportunity to pass on to their sellers part of the economic burden of the tax. J.S. App. 6. Of course, such a possibility would obtain with or without the statutory provision.

Of additional significance in considering Washington's fish tax is its purpose—furtherance of Washington's salmon enhancement efforts which benefit Indians, as well as non-Indians. Cf. *United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985), *cert.denied* ____ U.S. ____; 88 L.Ed.2d 358 (1985).[3] (Hatchery fish are to be included in Indian entitlement.)

In 1977, the Washington legislature provided for the funding of a major salmon enhancement program. It did so by providing for the issuance of $31,500,000 of the State's general obligation bonds for the development of salmon hatcheries and related facilities. (chapter 308, Laws of 1977, 1st Ex. Sess.). The authorization was subsequently increased to $34,500,000 in two separate statutory amendments in 1980 and 1981. (chapter 15, § 1, Laws of 1980; chapter 261, § 1, Laws of 1981).

Under Wash. Rev. Code § 75.48.100, a prerequisite to the issuance of any such bonds is certification by the

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[2]High Tide suggests in its Jurisdictional Statement that:

> For purposes of this case, the most significant aspect of the tax is that the parties liable for the tax, fish purchasers, are allowed to deduct one-half of the tax from the price paid to the fishermen. J.S. 5.

As we will demonstrate, this provision actually is of no significance whatsoever in the context of High Tide's claim and rather, serves only to camouflage the true nature of that claim.

[3]High Tide's insinuation that the fish tax was amended in 1978 in order to disadvantage Indian fishermen has no support in the record of this case or in fact. J.S. 7.

Washington Department of Fisheries that on the basis of annual revenue estimates, receipts from license sales and salmon fees and taxes will be sufficient to service the debt represented by these bonds.

Quite simply, Washington's fish tax, together with the other statutorily specified receipts, is the true source for the financing of these bond issues. The bond issues, in turn, have funded the State salmon enhancement program—a program from which High Tide, as well as treaty Indians, benefit.[4]

B. HIGH TIDE'S CLAIM

High Tide is a Washington partnership, all of whose partners are non-Indians. High Tide is in the business of purchasing fresh salmon from fishermen, processing the fish and then, wholesaling it to third parties. High Tide purchases fish from both treaty Indians and non-treaty fishermen.

High Tide's essential claim in this appeal is that it is immunized from liability for Washington's fish tax, as applied to its possession of fish purchased from treaty Indians.

High Tide's claim was originally a more modest one. In administrative proceedings before the Department of Revenue, High Tide sought only a refund of one-half of the amount of the excise tax which it had paid upon purchases of fish from treaty Indians, on the theory that High Tide could not and had not attempted to deduct an amount equal to half of the tax from the purchase price paid to treaty fishermen. At the administrative level, then, High Tide did not challenge the entire tax. J.S. App. 14, 20.

In its action before the Thurston County Superior Court, High Tide expanded its claim, contesting the entire tax as applied to its possession of fish purchased from both

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[4]Currently, approximately $5,300,000 of the bonds remain authorized but unissued. Future issuance of these bonds would be jeopardized, absent this tax.

treaty Indian and non-treaty sellers. This challenge was based upon various state law grounds, rejected by the courts below. Additionally, High Tide continued to challenge the entire tax, on various federal grounds, and now seeks review of the decision of the Washington Supreme Court which rejected High Tide's federally based challenges.

The nature of High Tide's claim is perhaps obscured by High Tide's suggestion that alternative, "less burdensome" taxes, free of the "infirmity" which High Tide attributes to the fish tax, could be imposed upon fish purchasers. That "infirmity" is identified at page 8 of High Tide's Jurisdictional Statement, where High Tide asserts that the fish tax operates:

> * * * in a manner that either imposes the economic burden of half the tax on treaty Indian fishermen or makes it more expensive for fish purchasers to buy fish from treaty Indian fishermen than from their non-Indian counterparts.[5]

At page 17 of the Jurisdictional Statement, High Tide offers an alternative tax scheme. There, High Tide states:

> The State could divide the tax equally between fish purchasers and taxable fishermen, as it did prior to 1978. See RCW 75.32 (1962) (imposing a two percent "privilege fee" on purchasers and a two percent "catch fee" on fishermen). * * *

High Tide's presumably sincere suggestion that such a tax system obviates the "infirmity" which High Tide finds in Chapter 82.27 Wash. Rev. Code is, at best, naive.

As to the two percent privilege fee, the same perceived infirmity exists, for the fish purchaser is still faced

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[5]Note that this "infirmity", which High Tide attributes to the fish tax is, according to High Tide's argument, one which cannot be avoided. That is, according to High Tide, if part of the economic burden is passed on to treaty fishermen, treaty rights are violated. On the other hand, if the fish purchaser, absorbs the entire economic burden of the tax, in purchases from treaty fishermen, the purchaser's equal protection or Indian commerce clause guarantees are violated.

with the same two alternatives which supposedly create that infirmity. He will (1) either pass on part of the economic burden of the tax to treaty Indians and thereby, under High Tide's argument, violate treaty fishing rights or (2) according to High Tide, endure a diminution of Indian Commerce or Equal Protection Clause protections by paying more for fish purchased from treaty Indians than from their non-Indian counterparts, in dealings with whom the fish purchaser presumably will pass on part of the economic burden of the tax.

It seems evident that the "infirmity" which High Tide attributes to the fish tax may be "remedied" only by completely immunizing non-Indian fish purchasers from the fish tax, the very remedy High Tide sought before the courts below. Thus, High Tide's claim is, indeed, that of complete immunity from the fish tax with reference to fish purchased from treaty Indians, regardless of High Tide's effort to paint a more modest claim.

High Tide thus bases its claim of tax immunity on the fishing clause found in various treaties between Western Washington tribes and the United States,[6] the Indian Commerce Clause and the Equal Protection Clause of the Federal Constitution. Indeed, High Tide grounds much of its claim of immunity in an ill-defined meshing of these provisions.

C. ISSUES RAISED AND PASSED ON BELOW

High Tide raises before this Court a number of issues which either were not raised or were not passed upon by the Washington Supreme Court.

For example, the treaty fishing rights issue upon which High Tide so heavily relies in its Jurisdictional Statement is not in a proper posture for review by this Court. Although High Tide challenged the fish tax on the basis that it violated the fishing rights of treaty Indians,

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[6]See J.S. 1 for the text of the fishing clause relied upon by High Tide.

both the state trial court and the Washington Supreme Court refused to pass upon that issue, holding that High Tide lacked standing to raise it. See J.S. App. 8 where the Washington Supreme Court ruled:

> Plaintiffs do not have standing to challenge RCW 82.27 by asserting treaty rights of Indians.

The treaty rights issue, not having been properly raised or passed on by the court below, is not properly before this Court. *Illinois v. Gates*, 462 U.S. 213 (1983); See also Rule 15.1(g).[7]

High Tide also chastises the Washington Supreme Court for failing to consider a number of issues which High Tide never presented to that court and then goes on to explore those issues in its Jurisdictional Statement. For example, at J.S. 11, High Tide states:

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[7]This Court has often recognized that when:

> * * * the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary. *Street v. New York*, 394, U.S. 576, 582 (1969).

In order to make that affirmative showing, it would be incumbent upon High Tide to demonstrate that the court below was clearly wrong in holding that High Tide lacks standing to challenge the tax by asserting the treaty rights of Indians. No such showing appears in the Jurisdictional Statement.

The only reference to this issue is found in a single footnote. J.S. 12 n. 3. There, High Tide alleges that the willingness of the court below to decide High Tide's claim under the Indian Commerce Clause is irreconcilable with the court's ruling that High Tide is without standing to challenge the tax by asserting the treaty rights of Indian fishermen.

It seems clear to us that the court below was of the sound view that treaty rights are conferred only on Indians, whereas rights under the Indian Commerce Clause extend to Indians as well as those with whom they deal. Thus, the Washington Supreme Court's consideration of High Tide's Indian Commerce Clause claim is in no respect inconsistent or irreconcilable with its ruling that High Tide lacks standing to challenge the tax by asserting the fishing rights of treaty Indians.

We additionally suggest that High Tide lacks standing to raise the fishing rights of treaty Indians in this forum, under Article III and prudential limitations on the jurisdiction of this Court. *Valley Forge College v. Americans United*, 454 U.S. 464 (1982).

> The court did not address any of the issues or complexities raised by the existence of either tribal taxes on commercial fish sales or the credit provided under the Washington statute for taxes paid to other States but not to Indian tribes.

High Tide asserts that Indian tribes imposed such fish taxes on treaty Indians and fish purchasers and appends to its Jurisdictional Statement two examples of such taxes. See J.S. App. D, E.

High Tide does not identify any part of the record before the Washington courts where either of these issues was raised. That is because High Tide never raised them. Neither tribal tax contained in J.S. App. D nor E is part of the record below. In fact, both of those provisions postdate the period addressed in this litigation. High Tide never asserted the existence of any tribal taxes or alleged that it or its purchasers had been subjected to such taxes. Similarly, High Tide never raised any issue below concerning the credit provision contained in Chapter 82.27 Wash. Rev. Code during the period relevant to this appeal.[8]

These issues were not considered or passed on by the Washington Supreme Court simply because High Tide did not raise them. Consequently, they are not properly before this Court.

The only issues properly raised below and passed on by the Washington State Supreme Court and thus, properly before this Court, are whether Washington's fish tax comports with Indian Commerce Clause and Equal Protection Clause requirements. As we demonstrate in the argument portion of this motion, the Washington State Supreme Court was clearly correct in holding that the fish tax is valid under the Indian Commerce Clause and the Equal Protection Clause.

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[8]As High Tide eventually concedes in its Jurisdictional Statement, since 1985, Washington's tax scheme has allowed a credit for taxes previously paid on the same food fish to any other legally established taxing authority. J.S. 22 n. 14. Accordingly, this concern, which was not raised below, is not even a continuing one.

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION AND THE DECISION BELOW IS CLEARLY CORRECT.

A. THE FISH TAX DOES NOT DISCRIMINATE AGAINST INDIAN COMMERCE.

High Tide recognizes that the Indian Commerce Clause precludes states from imposing undue burdens on, or unfair discrimination against, Indian commerce. J.S. 19. We agree, as did the Washington Supreme Court. J.S. App. 11. That the preclusion of undue burdens or unfair discrimination against Indian commerce is the essence of the Indian Commerce Clause is recognized by the following language of this Court in *Washington v. Confederated Colville Tribes*, 447 U.S. 134, 157 (1980).

> It can no longer be seriously argued that the Indian Commerce Clause, of its own force, automatically bars all state taxation of matters significantly touching the political and economic interests of the Tribes. See *Moe v. Salish & Kootenai Tribes, supra*, at 481, n. 17. That Clause may have a more limited role to play in preventing undue discrimination against, or burdens on, Indian Commerce. But Washington's taxes are applied in a nondiscriminatory manner to all transactions within the State.

Just as Washington's imposition of a non-discriminatory tax on non-Indian purchasers of cigarettes from Indian smoke shops did not run afoul of Indian Commerce Clause requirements in *Colville*, so Washington's imposition of a non-discriminatory tax on non-Indian purchasers of fish from Indian fishermen comports with Indian Commerce Clause requirements here. There is no reason why the Indian Commerce Clause should be applied in this case differently from the way it was applied in *Colville*.

It also seems apparent that High Tide does not broach the Indian Commerce Clause for purposes of taking issue with the decision of the court below. That court applied existing Indian Commerce Clause standards and did so correctly. Rather, High Tide's Indian Commerce Clause

argument is an invitation to this Court to develop an entirely new approach to analysis of state taxes under the Indian Commerce Clause. That approach, according to High Tide, should focus on considerations such as the potential impact of state taxes on tribal sovereignty and the ramifications of multiple taxes. J.S. 19-20. High Tide further suggests that:

> This case presents an ideal opportunity for this Court to examine the Indian Commerce Clause and articulate standards for its application. * * * J.S. 18.

We see no need for this Court to depart from the currently prevailing contours of Indian Commerce Clause analysis, as most recently set forth and applied in *Colville*. Additionally, we can envision no case less appropriate for the examination in which High Tide invites this Court to engage. No Indian or Indian tribe is a party to this case. No evidence was presented below of any interference with tribal sovereignty or of the existence or potential impact of multiple taxes. In short, the circumstances which High Tide urges this Court to consider in developing new Indian Commerce Clause standards are not addressed on the record of this case.

B. WASHINGTON'S FISH TAX RAISES NO SIGNIFICANT EQUAL PROTECTION ISSUE.

High Tide presses an equal protection challenge to Washington's tax in spite of the fact that the tax is imposed at the same rate and measure on all purchasers of fish for commercial purposes. It contains no classification dependent upon the identity of the party from whom the fish are acquired.[9]

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[9]In this respect, High Tide's claim is in quite an odd posture. It is unlike the cases considered by this Court where a statutory shifting of the legal incidence of the tax in transactions involving tax immune entities, creates the classification upon which a discrimination claim is bottomed. *Washington v. United States*, 460 U.S. 536 (1983); *Colville*. Here, there is no shifting of the legal incidence of the tax. It is consistently imposed on the same entity. Nevertheless, an equal protection claim is pressed by High Tide.

Indeed, High Tide's equal protection argument is predicated not so much upon the statute, as it is upon High Tide's own notion that both of the following circumstances prevail with regard to Washington's tax, *i.e.*, that the statute (1) requires non-Indian fishermen to bear part of the economic burden of the tax, regardless of market conditions, and that (2) treaty fishing rights prohibit fish purchasers from passing on part of the economic burden to Indian fishermen. High Tide is wrong on both prongs of this argument.

As previously noted, High Tide challenged the validity of Wash. Rev. Code § 82.27.020(2) below, on the state law grounds that the "may deduct" language of the provision constituted an unlawful delegation of legislative authority. Rejecting that challenge, the Washington Supreme Court ruled that the "may deduct" language merely allows the parties liable for the tax to pass on to their sellers part of the economic burden of the tax, if market forces so allow. J.S. App. 6, 11. The statute in no respect mandates such a "pass on" or imposes liability for the tax on fish sellers, Indian or non-Indian.

As to demonstrating the relative economic power of fish sellers and fish buyers and thus, the ability of fish purchasers to pass on the economic burden of the tax to non-Indians, the record in this case is deficient.

The second prong of High Tide's equal protection argument is essentially based in a claim that the tax violates the fishing rights of treaty Indians.[10] As previously noted,

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[10]Further underscoring the rather bizarre posture of this equal protection claim is a record disclosing an inclination on the part of treaty fishermen to accept the same amount for their fish as that paid to non-Indians and a refusal by High Tide to abide such an equality of treatment.

Below, High Tide submitted a form affidavit from three treaty Indians. Clerk's Papers 201-206. Each contains the following statement:

> If HIGH TIDE SEAFOODS were to offer me a lower price for my salmon than HIGH TIDE SEAFOODS offers to non-treaty fisherman (sic) for their salmon, I would consider that as a violation of my treaty fishing rights and of my rights and privileges secured

that claim is not properly before this Court. It additionally is wrong for reasons we briefly address here.

High Tide cites *Tulee v. Washington*, 315 U.S. 681 (1942) as support for its argument that the fish tax violates the fishing rights of treaty Indians. In fact, High Tide goes so far as to suggest that the decision below "obviously and directly conflicts with *Tulee*." J.S. 13. That simply is not so.

Tulee concerned the validity of a Washington statute which required treaty Indians to obtain a license in order to fish. This Court ruled that the fishing rights of treaty Indians precluded the State from charging the Indian a fee for fishing. Here, by contrast, the State has imposed no fee whatsoever upon the Indian. The State has simply imposed a non-discriminatory tax on non-Indian purchasers, with respect to their commercial use of fish caught by both treaty Indian and non-treaty fishermen. High Tide, then, apparently cites *Tulee* for the proposition that imposition of a non-discriminatory tax on non-Indians, with respect to fish purchased from treaty Indians, violates Indian fishing rights. *Tulee* simply stands for no such proposition.[11]

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by the Constitution and Statutes of the United States of America.

High Tide, on the other hand, submitted an affidavit from one of its partners explaining High Tide's refusal to pass on part of the economic burden of the tax in the following fashion:

> High Tide Seafoods and its management, including myself, believe that such a reduction of the price it pays to treaty Indian fishermen would constitute a violation of the treaty Indian fishermen's treaty fishing rights and their rights and privileges secured by the Constitution of the United States of America. Clerk's Papers 208.

[11]High Tide's effort to bolster this argument by reliance on *Ramah Navajo School Board, Inc v. Bureau of Revenue*, 458 U.S. 832 (1982) and *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980) fails. Those cases are readily distinguishable from the instant one in at least three vital respects. First, in both *White Mountain* and *Ramah*, this Court found that a pervasive scheme of federal regulation precluded imposition of the state's tax on non-Indians. Second, in neither case did the State seek to assess the tax for governmental functions it

High Tide's argument in this respect amounts to nothing more than an appeal for resurrection of the discredited theory that one who deals with Indians is entitled to an *implied* immunity from taxation, on the grounds that the economic impact of the tax may be borne by the Indian. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 150 (1973); *Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1976); *Colville*.

CONCLUSION

For the foregoing reasons, the questions presented by this appeal are so unsubstantial as to require no further argument. Accordingly, this appeal should be dismissed or, in the alternative, the judgment below should be affirmed.

DATED this 22nd day of January, 1987.

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performed on behalf of those upon whom either the incidence or the economic burden of the tax fell. Finally, in each case, the non-Indian taxpayer was engaged in business, within the boundaries of an Indian reservation. These circumstances simply do not obtain here. There is no pervasive scheme of federal regulation identified or involved in this case. Here, Indians as well an non-Indians benefit from the salmon enhancement efforts of the State, the funding of which is effectively tied to the fish tax. High Tide does not conduct its business within the boundaries of an Indian reservation.

Supreme Court, U.S.
FILED
FEB 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-960

In The
Supreme Court of the United States
October Term, 1986

HIGH TIDE SEAFOODS, ET AL.,
Appellants,
v.
STATE OF WASHINGTON, ET AL.,
Appellees.

On Appeal from the Supreme Court of the State of Washington

APPELLANTS' BRIEF IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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ARGUMENT

Washington argues that the issues presented by High Tide are not substantial. Yet its arguments demonstrate precisely the opposite.

1. Washington asserts that the Washington Supreme Court "applied existing Indian Commerce Clause standards and did so correctly." Motion to Dismiss or Affirm (MDA) at 9. That is *not* what the Washington Supreme Court said it did. That Court said that "no clear and precise modern test for the validity of taxes affecting Indian commerce has been articulated by the United States Supreme Court," App. 10, and then proceeded to conduct its analysis on the basis of this Court's decisions applying the Interstate Commerce Clause, App. 11. The standards under the two Clauses are entirely different. Jurisdictional Statement (JS) at 14-15.

2. Washington also contends that *Washington v. Confederated Colville Tribes*, 447 U.S. 134 (1980), is dispositive and that the other Indian cases are distinguishable. MDA at 9 and 12 n.11. But the Washington Supreme Court did not consider the other Indian cases and only cited *Colville* for the undisputed proposition that the Indian Commerce Clause "does not bar all state taxation of matters touching the economic interests of Indian tribes . . ." App. 11. As Washington implicitly recognizes, whether its challenged fish tax is more similar to the cigarette tax upheld in *Colville* or to the state taxes and fees struck down in this Court's more recent Indian decisions is the core question presented in this case. That question was not addressed by the Washington Supreme Court and obviously is substantial. Indeed, viewed from that perspective,

the Washington Supreme Court's decision is clearly erroneous and should be summarily reversed.[1]

3. Washington now argues that the adverse economic effects of its tax on treaty Indian fishermen have not been established. MDA at 2-3, 11. That was not its position before the Washington Supreme Court. That Court adopted the State's premise that "the purchaser may pass part or all of the tax burden to the nontaxable fisherman." App. 12, and then held that that was permissible so long as the legal incidence of the tax was imposed on the fish purchaser, App. 11. Having successfully urged the Washington Supreme Court to assume that the economic burden of the challenged tax falls at least partially on nontaxable treaty Indian fishermen, Washington is now in the peculiar position of undermining the theory on which it has heretofore prevailed.

4. Washington seeks to justify its tax by going outside the record to claim that treaty Indian fishermen bene-

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[1] The basis of the *Colville* holding was that the sale of cigarettes to non-resident, non-Indians at tribal smokeshops was an effort to market a tax exemption and "that the value marketed by the smokeshops . . . is not generated on the reservations by activities in which the Tribes have a significant interest." 447 U.S. at 155. By contrast, the sale of fish caught by Indian fishermen exercising their treaty rights is an activity in which tribes have a significant interest and to which they contribute all of its value. *See e.g.*, Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979); Tulee v. Washington, 315 U.S. 681 (1942). It is clearly more analogous to the state taxes and fees on the harvesting of reservation timber, the construction of an Indian school and the taking of reservation fish and wildlife which were held to be preempted in White Mountain Apache Tribe v. Bracker, 448 U.S. 136 (1980); Ramah Navajo School Bd. Inc. v. Bureau of Revenue, 458 U.S. 832 (1982); and New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983).

fit from the challenged tax. MDA at 3-4, *citing United States v. Washington*, 759 F.2d 1353 (9th Cir. 1985), *cert. denied*, — U.S. —; MDA at 12 n.11. Washington neglects to mention, however, that tribes operate and maintain their own hatcheries which benefit both Indians and non-Indians. *See* 759 F.2d at 1359. The tribes' efforts to enhance the overall fishery and to provide other essential services to their members are thwarted by Washington's challenged tax which leaves no room for tribal taxes on one of the tribes' only available sources of revenue. *See* Puyallup Tribe's Amicus Curiae Brief at 5.

5. Washington concedes High Tide's standing to challenge the tax as a violation of the Indian Commerce Clause. But it argues that that analysis must be undertaken without regard to the underlying treaty right to take fish. MDA at 6-7.[2] High Tide is not aware of any decision of this Court holding that a litigant cannot make an argument encompassed within an issue that it has standing to raise.

The Washington Supreme Court denied High Tide standing to raise the treaty right issue because of its prudential concern that High Tide "will not be able to prove their [sic] injury falls within the zone of the fishing rights of treaty Indians." App. 8. That Court did not hold that High Tide lacks constitutional standing to raise the treaty

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[2] The lack of merit in Washington's position is manifest when it is considered that the treaty guarantees and protects the right to take fish for *commercial* purposes. Washington v. Fishing Vessel Ass'n., *supra*, 443 U.S. at 665 n.6, 688. As such, it is subject to the protection of the Indian Commerce Clause. *Cf.* McClanahan v. Arizona Tax Comm'n., 411 U.S. 164, 172 n.7, 173-175 (1973).

fishing right issue. *See Allen v. Wright,* 468 U.S. 737, 751-752 (1984). Accordingly, High Tide addressed the prudential concern in its Jurisdictional Statement, arguing it has *jus tertii* standing to assert that the state fish tax violates Indian treaty fishing rights under this Court's decision in *Craig v. Boren,* 429 U.S. 190, 192-197 (1976). *See* JS at 12 n.3.

Washington did not respond to High Tide's assertion of *jus tertii* standing. Nor did it attempt to distinguish *Craig v. Boren.* At the very least, High Tide's standing to rely on the commercial fishing rights secured by treaties as part of its Indian Commerce Clause challenge to Washington's fish tax presents a substantial federal question which merits this Court's attention.

6. Finally, Washington argues that certain arguments made by High Tide in its Jurisdictional Statement are new and therefore should not be considered by this Court. MDA at 8.[3] The principal issue raised by High Tide from the outset of this litigation is that Washington's tax impermissibly burdens Indian commerce. The Washington Supreme Court specifically rejected that claim. App. 10-11. The arguments to which Washington objects are enlargements or refinements of that basic question.[4] They are

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[3] In particular, Washington objects to High Tide's arguments that the existence of tribal taxes must be taken into account in the Indian Commerce Clause analysis and that the State should be required to give credits for tribal taxes as it does for taxes paid to other states. See JS at 5-6, 19-22 and n.14.

[4] Viewed in context, High Tide's "new" contentions are responses to the rationale adopted by the Washington Supreme Court. They are part of the continuing refinement of issues that

(Continued on following page)

therefore properly before this Court. *Illinois v. Gates*, 462 U.S. 213, 217-220 (1983), *discussing Dewey v. Des Moines*, 173 U.S. 193, 197-198 (1899).

CONCLUSION

Washington's Brief succeeds only in demonstrating the deficiencies in the decision below and that the federal questions presented in this appear are indeed substantial.

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(Continued from previous page)

almost always occurs as litigation progresses from one level to another in our multi-tied system. The opportunity for such refinement was limited in this case prior to the Washington Supreme Court's decision. There was no decision by Washington's intermediate Court of Appeals. JS at 9. The Thurston County Superior Court's decision is unreported and unrecorded. The two opinions issued by the Washington Department of Revenue, App. 14-18, are cursory. They do not mention the Indian Commerce Clause issue, presumably because "the Department of Revenue is without authority to declare an act of the legislature unconstitutional." App. 17.

Supreme Court, U.S.
FILED
JAN 24 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-960

In The
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HIGH TIDE SEAFOODS, et al.,
Appellants,
v.
STATE OF WASHINGTON, et al.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

BRIEF OF THE PUYALLUP INDIAN TRIBE, AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

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BRIEF OF THE PUYALLUP INDIAN TRIBE, AS AMICUS CURIAE IN SUPPORT OF THE JURISDICTIONAL STATEMENT

INTEREST OF THE AMICUS CURIAE

The Puyallup Indian Tribe is a party to the Treaty of Medicine Creek, 10 Stat. 1132 (1855). Article III of that Treaty provides:

> The right of taking fish, at all usual and accustomed grounds and stations, is further secured to said Indians, in common with all citizens of the Territory, . . .

Puyallup tribal members participate in the salmon harvest pursuant to their fishing rights secured by this Treaty as affirmed in *Washington v. Fishing Vessel Ass'n,* 443 U.S. 658 (1979). Tribal fishermen are protected from state taxation by this Court's decision in *Tulee v. Washington,* 315 U.S. 681 (1942). Appellant High Tide Seafoods purchases fish from tribal members.

Commercial fishing pursuant to the treaty right is a major source of income for many tribal members. In addition, this exercise of the treaty right has provided the Tribe with a revenue base which bolsters the tribal goal of self-sufficiency. Section 14 of the Puyallup Fisheries Management Code imposes a tax on tribal fishermen:

> The Puyallup Nation hereby imposes a gross receipts tax on each tribal member and authorized fisher who engages in commercial fishing pursuant to the treaty fishing rights of the Nation and on each act of fishing pursuant to those rights. The tax is imposed for the privilege of exercising those treaty fishing rights, in order to help defray a portion of the cost of the Nation's fisheries management and regulatory program. . . .

The tax rate is set at two cents per pound of fish sold. The relevant sections of the Puyallup Fish Tax Ordinance are reproduced in the Appendix.

The state tax upheld by the Washington Supreme Court (RCW 82.27.020 (1981)), poses tribal fishermen with Hobson's choice: either indirectly pay the tax by reducing the price of their fish, or not sell the fish. The shift of the economic burden of the tax to Indian fishermen violates the Tribe's treaty rights and directly impacts the revenues of the Puyallup Tribe and its fishermen.

The failure of the state tax to grant a credit for tribal taxes, while granting one for taxes of other states, also directly impacts the Tribe's ability to raise money through taxation, and is a denial of equal protection of the laws to the Tribe and its members.

This brief is filed with the consent of the parties, whose letters of consent have been lodged with the Clerk.

———o———

THE ISSUES PRESENTED ARE SUBSTANTIAL AND IMPORTANT

The State of Washington has gone through "extraordinary machinations" to subvert federal decisions enforcing Indian fishing rights guaranteed by treaty. *Washington v. Fishing Vessel Ass'n, supra,* 443 U.S. at 696, n.36. The state supreme court's decision here shows the same lack of respect for Indian rights and decisions of this Court, and should be corrected either by summary reversal or after plenary hearing. Moreover, if allowed to stand, Washington's method of avoiding the impact of this Court's decision in *Tulee v. Washington* may lead to similar attempts in the numerous other states where Indians have treaty fishing rights.[1]

It has been clear, at least since this Court's decision in *Tulee v. Washington, supra,* that the State of Washington had no authority to tax an Indian's exercise of his

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[1]Such rights exist in the Pacific Northwest, in Alaska, in the Great Lakes states, as well as within various reservations in other states. *See* Cohen's *Handbook of Federal Indian Law,* 1982 edition, pp. 442-46.

treaty protected fishing rights. The State, to avoid this result, has abolished its taxes on fishermen's catches (former RCW 75.32 (1962)) and established a tax on the fish purchaser. This tax has extraordinarily given the purchaser a right—but no duty—to collect half of the tax from the seller. (RCW 82.27.020 (1981)). This extraordinary "option" on the part of the purchaser is for no other purpose than to let the purchaser do what the State could not do. The purchaser must pay the tax in full whether he collects it or not. Ordinarily he collects it from the non-Indian seller and passes it along to the State. He cannot lawfully collect it from the Indian seller because of *Tulee v. Washington*. The purchaser thus is forced either not to buy from the Indian—because the purchaser cannot recoup his tax—or to pay the Indian less—thereby recouping his tax and subverting the Indian's tax immunity. In the present case, however, the purchaser properly chose a third course—to challenge the tax.

The Washington Supreme Court acknowledged the consequences of the State's taxing scheme, but it nevertheless concluded that RCW 82.27.020 is valid because the "parties have the opportunity to allocate the burden among themselves by adjusting the price", i.e., by the treaty Indian fisherman agreeing to accept less for his fish. *Pet. App. at 11.* The loss of revenue to the treaty Indian fisherman resulting from the Washington taxing scheme can be viewed in two ways, either as a state-imposed diminution of the market value of the Indian's fish if the Indian exercises his federally guaranteed immunity from state tax, or as indirect payment of half the fish excise tax by the Indian just as if he had no immunity.

Viewed either way, the Washington taxing scheme is patently invalid under federal law. As a diminution in the market value of the Indian's fish because the Indian exercises a federal right, it unfairly discriminates against, and places an undue burden on, Indian commerce. *See, Merrion v. Jicarilla Apache Tribe,* 455 U.S. 130, 153-54 (1982) (Indian commerce clause is "shield to protect Indian tribes from state and local interference"); *Washington v. Confederated Colville Tribes,* 447 U.S. 134, 157 (1980) (Indian commerce clause prevents "undue discrimination against, or burdens on, Indian commerce"). *See also, Ramah Navajo School Board, Inc. v. Bureau of Revenue,* 458 U.S. 832, 845-46 (1982). As a pass-through tax on treaty Indian fishermen, "it acts upon the Indians as a charge for exercising the very right their ancestors intended to reserve" and is therefore inconsistent with the fishing rights reserved by treaty. *Tulee v. Washington, supra,* 315 U.S. at 685.

Furthermore, one of the principal Indian policies of this and prior Administrations has been to decrease the financial dependence of Indians and Indian tribes upon the United States. Attaining that goal depends on the existence of an adequate tribal tax base. *See e.g., Merrion, supra,* 455 U.S. at 138, n.5. The Puyallup Tribe and other fishing tribes tax their own fishermen—it is one of their few sources of tax revenue. Washington's tax scheme effectively deprives the Puyallup Tribe and similar tribes of potential tax revenues by not leaving room for tribal taxes. Indian fishermen simply will not be able to compete effectively and pay the tribal taxes if they are also required to shoulder the economic burden of the State's tax despite their federal immunity from state taxation.

Cf. Japan Line, Ltd. v. County of Los Angeles, 441 U.S. 434, 446-48 (1979).

CONCLUSION

The questions presented by this case are substantial. The State of Washington has adopted a taxing scheme which unduly burdens, and discriminates against, Indian commerce. In addition, the Washington Supreme Court's decision circumvents federal law that treaty fishing rights may not be taxed. The implementation of the Washington Supreme Court's holding defeats executive policy encouraging the financial independence of tribal governments. Probable jurisdiction should be noted and the decision below should be reversed, either summarily on the basis of *Tulee v. Washington, supra,* and *Washington v. Fishing Vessel Ass'n, supra,* or after plenary hearing.

Respectfully submitted,

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APPENDIX

Section 14 of the Puyallup Fisheries Management Code provides:

a. The Puyallup Nation hereby imposes a gross receipts tax on each tribal member and authorized fisher who engages in commercial fishing pursuant to the treaty fishing rights of the Nation and on each act of fishing pursuant to those rights. The tax is imposed for the privilege of exercising those treaty fishing rights, in order to help defray a portion of the cost of the Nation's fisheries management and regulatory program.

b. The tax shall be imposed in the sum of two (2) cents per pound of fish sold by a tribal member or other authorized fisher. One-half of the revenue raised by that tax shall be deposited to the budget of the Fisheries Management Division; one-half of the revenue shall be deposited to the Tax and Licensing Account.

* * *